List of Exhibits (by Exhibit # below)

FCC Orders Granting Extensions of Time

1. *Memorandum Opinion and Order*, DA 04-3864, released 12/09/04, re: Request of Warren C. Havens for waiver of the five-year construction requirement for his Location and Monitoring Services licenses.
2. Letter granting FCR, Inc.'s Request for Extension of Five-Year Construction Requirement Call Signs: WPOJ871, WPOJ872, WPOJ873, WPOJ874 and WPOJ875, *Letter*, 20 FCC Rcd 4293 (WTB MD 2005) (*FCR M-LMS Letter*), *petition for reconsideration pending*.
3. *Memorandum Opinion and Order*, DA 06-1094, released 5/24/06, re: Request of Progeny LMS, LLC for a Three-Year Extension of the Five–Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses
4. *Order on Reconsideration and Memorandum Opinion and Order*, DA 07-479, released 1/31/07, re: denial of petitions for reconsideration of Progeny LMS, LLC and FCR, Inc. extension requests and grant of additional time to meet construction benchmarks for Helen Wong-Armijo, FCR, Inc. and Telesaurus Holdings GB LLC.

Progeny LMS, LLC ("Progeny") Ex Parte and Due Diligence Filings

5. Progeny Notice of *Ex Parte* Presentation dated 10/7/08 in WT Docket No. 08-60, re: meeting with legal advisor to Chairman Martin to discuss the issues raised in the Progeny extension request proceeding.
6. FCC Response to FOIA Request 2008-683 dated 9/18/08 that contains, among other items, the Progeny confidential due diligence showing for its second extension request—see Document 000003 of the response, which among other things, states that Progeny terminated its contract on March 5, 2008, after it "became apparent" in Feb. 1, 2008 meetings with FCC staff that the FCC "unprepared to accept Progeny's April 3, 2007 proposals or anything similar".
7. Attachment "Request for Waiver and Limited Extension of Time" to Progeny's Request for Extension of Time filed 5/01/08, in which Progeny erroneously claims that pseudolites will not work on the LMS band and rules without any showings to support such claims.
8. Progeny Notice of *Ex Parte* Presentation dated 2/04/08 in WT Docket No. 06-49, re: meetings with FCC staff to discuss Progeny's proposed technical rules for LMS. These are the meetings referenced in Document 000003 of Exhibit 6 above.
9. Progeny Written *Ex Parte* Presentation dated 1/22/08 in WT Docket No. 06-49, re: petition for reconsideration filed against Progeny transfer of control applications that contains among other facts evidence that Progeny's LMS licenses are not valid.
10. Progeny Written *Ex Parte* Presentation dated 5/16/07 in WT Docket No. 06-49, re: Progeny request to disregard a 5/7/07 *ex parte* filing by Telesaurus Holdings GB LLC that contains among other facts evidence that Progeny's LMS licenses are not valid.
11. Progeny Written *Ex Parte* Presentation dated 4/27/07 in WT Docket No. 06-49, re: Progeny opposition to a 4/23/07 *ex parte* filing by Telesaurus Holdings GB LLC that contains among other facts evidence that Progeny's LMS licenses are not valid.

12. Exhibit 1 to the FCR, Inc. Request for Extension of Time filed 6/18/04, File Nos. 0001778449 through 0001778454, that states in part as due diligence that FCR, Inc. is dependent on the larger LMS licensees developing viable LMS equipment.
13. Attachment to Helen Wong-Armijo's Request for Extension of Time filed 9/14/06 that attaches and refers to the FCR, Inc. Exhibit 1 above.
14. *Order*, DA 07-939, released 3/01/07 re: PCS Partners, L.P.'s petition for waiver and request for refund asking to have its auction application dismissed without defaulting penalties and its payments to date refunded.
15. Attachment 1 to PCS Partners, L.P. Request for Extension of Time filed 6/12/08 that contains PCS Partners arguments for grant of a waiver. PCS Partners does not provide any evidence that it is actively pursuing and funding development of LMS equipment other than asking vendors if there is any yet. Also, PCS Partners erroneously states that there are "technical impediments" to the use of pseudolites in the LMS band without any showings to support such claims.

NEXT DOCUMENT

EXHIBIT 1 FOLLOWS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
Request of Warren C. Havens for Waiver of	)
the Five-Year Construction Requirement	)
for his Multilateration Location and Monitoring	)
Service Economic Area Licenses	)

MEMORANDUM OPINION AND ORDER

ADOPTED: December 8, 2004 **RELEASED:** December 9, 2004

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On December 3, 2003, Warren C. Havens (Havens) filed a Request to Waive the five-year construction requirement for his multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses.[1] For the reasons stated below, we find that the public interest would be served by granting Havens a three-year extension of the five-year construction requirement.

II. BACKGROUND

2. In 1995, the Commission established rules governing the Location and Monitoring Service (LMS) in the 902-928 MHz frequency band.[2] The LMS is intended to support the nation's transportation infrastructure and to facilitate the growth of Intelligent Transportation Systems through the use of location and transmitter tracking technologies.[3] There are two types of LMS systems – multilateration (M-LMS) and non-multilateration.[4] M-LMS systems are designed to locate vehicles or other objects by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a mobile unit to a number of fixed receive points, or from a number of fixed transmitter points to the receiving unit to be located.[5] Non-multilateration systems are those that employ any technology other

---

1 *See* Request for Partial Waiver (Waiver of the Five-Year Construction Benchmark) (filed Dec. 3, 2003) (Waiver Request). On July 14, 2004, Havens filed an Amended Request, in which he is seeking a three-year extension of the construction deadline. *See* Request for Partial Waiver, Amended Request (filed July 14, 2004).

2 Amendment of Part 90 of the Commission's Rules to Adopt Regulation for Automatic Vehicle Monitoring Systems, *Report and Order*, 10 FCC Rcd 4695 (1995) (*LMS Report and Order*).

3 The term "Intelligent Transportation Systems" refers to the collection of radio technologies that, among other things, is intended to improve the efficiency and safety of our nation's highways. *LMS Report and Order* at 4698 ¶5.

4 *See LMS Report and Order* at 4703 ¶14.

5 *Id.*

than multilateration technology to transmit information to and from vehicles.[6]

3. In 1998, the Commission modified the M-LMS rules to allow more time for auction winners to satisfy their construction requirements.[7] The Commission concluded that a one-year build-out period was insufficient for M-LMS licensees because the one-year requirement was based on rules for site-based systems and it would be difficult for licensees to meet the deadline without raising a prohibitive amount of initial capital, and thus determined that such licensees would be required to construct and place in operation a sufficient number of base stations to provide M-LMS to one-third of an EA's population within five years of initial license grant and two-thirds of the population within ten years.[8] Havens holds fifty-two M-LMS licenses,[9] which he acquired in Auction No. 21. The licenses were granted on July 14, 1999, and had five-year construction deadlines expiring on July 14, 2004.

4. On December 3, 2003, Havens filed a request to waive the five-year construction requirement for his M-LMS Economic Area licenses in its entirety. On July 14, 2004, Havens amended his request to seek a three-year extension of the five-year construction requirement. On March 18, 2004, we sought comment on Havens' Waiver Request.[10] We received a single opposing comment from Mobex Network Services, LLC (Mobex), and a reply comment from Havens.[11]

III. DISCUSSION

5. Pursuant to Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,[12] a M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirements for its license, unless the Commission grants an extension request or waives the LMS construction requirements**.** A waiver may be granted, pursuant to Section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.[13] Additionally, we may grant an extension of time to

---

6 *Id.*

7 *See* In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182, 15197-98 ¶30 (1998) (*LMS Second Report and Order*).

8 *Id.* We note that section 90.155(d) of the Commission's rules, 47 C.F.R. § 90.155(d), provides that M-LMS systems must be constructed within twelve months from the date of grant. This section was not amended to reflect the Commission's decision in the *LMS Second Report and Order*, which applied to LMS auction winners. However, the five-year and ten-year construction requirements for these authorizations are listed on the licenses.

9 *See* Waiver Request at Appendix A.

10 Wireless Telecommunications Bureau, Mobility Division Seeks Comment on Warren C. Havens' Request for Waiver of Multilateration Location and Monitoring Service Five-Year Construction Requirement, *Public Notice*, DA 04-731 (Mar. 18, 2004).

11 On April 30, 2004, Mobex filed a Motion to Accept Untimely or Supplemental Filing, along with Reply Comments, and, on June 10, 2004, Havens filed a Request for Leave to Late-File Table of Contents and Summary to Reply Comments. We hereby accept Mobex's late-filed Reply Comments and Havens' late-filed Table of Contents and Summary to his Reply Comments.

12 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

13 47 C.F.R. § 1.925.

complete construction pursuant to Section 1.946(e) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.[14] The Commission has also stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving construction requirements on a case-by-case basis.[15] As discussed below, we find the circumstances set forth in Havens' Request warrant grant of an extension of time to meet the five-year construction requirement.

6. Havens contends that good cause exists to grant an extension. Specifically, Havens argues that M-LMS systems are unique because they must operate within particular technological parameters, such as co-existing with unlicensed devices and amateur radio service operations authorized under Parts 15 and 97 of the Commission's rules, respectively. Therefore, he notes that the development of multilateration location technology to operate commercially viable M-LMS systems has progressed slowly, and that no such equipment is currently available.[16] Havens contends that there has been no M-LMS equipment available in the market since he obtained his licenses in 1999. Havens states that he has undertaken substantial due diligence to fulfill construction obligations by attempting to develop advanced equipment for M-LMS systems.[17] Havens also contends that the unique attributes of M-LMS are similar to other services for which the Commission has not adopted an intermediate five-year construction requirement (*e.g.*, Wireless Communications Service) and only adopted a ten-year requirement.[18] Havens asserts that M-LMS shares certain characteristics with such services, including an undeveloped equipment market, unique operating requirements, and the promise of new and innovative services and, therefore, warrants similar treatment.[19]

7. We find that an extension of time of the five-year coverage requirements for the subject stations is warranted. Based on the totality of the record before us, we conclude that Havens has presented unique factual circumstances and that strict application of the construction requirement would be contrary to the public interest. We also agree that, in light of these circumstances, there is good cause to grant the request and that doing so will serve the public interest. First, we note that Havens' situation is unique in that no equipment is available, making it impossible for construction to occur at this time. Second, we note that the requirement in question is a five-year construction requirement, well in advance of the first renewal deadline for the licenses. Third, we note that the 902-928 MHz band is a unique spectrum sharing situation because it is available to multiple operations, including Government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations. We believe this situation has contributed to the difficulty of M-LMS licensees in obtaining equipment, and are persuaded that the unavailability of M-LMS equipment is due to causes beyond Havens' control. We note that Progeny, another holder of numerous M-LMS licenses, has filed a Petition for Rule Making to change the M-LMS rules arguing that

---

14 47 C.F.R. § 1.946. Section 1.946(e) also enumerates specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

15 *See, e.g.,* Amendment of the Commission's Rules To Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (*PCS MO&O*), *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

16 Waiver Request at 3-5. Havens reports that, in order to remedy this situation, he and a company he controls, Telesaurus Holdings GB, LLC (Telesaurus), have undertaken efforts to develop equipment for M-LMS systems. Waiver Request at 5.

17 *See* Request for Partial Waiver to Allow Ancillary Fixed Service, ULS No. 0001529701 (filed Nov. 26, 2003).

18 Waiver Request at 6-9.

19 *Id.* at 8.

the rules designed to promote sharing with other services are overly constraining and have contributed to the lack of equipment development.[20] For the reasons stated above, we believe the public interest is served by granting a three-year extension of Havens' five-year construction requirement. We believe that a three-year extension of the deadline will require Havens to actively pursue equipment development in the near term. Accordingly, we grant Havens' requests and extend the five-year construction deadline for the subject M-LMS Economic Area licenses from July 14, 2004, to July 14, 2007.

8. Mobex argues that Havens failed to demonstrate that he made a legitimate effort to obtain equipment.[21] Mobex further contends that the public interest will not be harmed by the denial of Havens' Waiver Request because the functional equivalent of M-LMS location service is presently available in the form of telematics,[22] and that grant of the request would be contrary to the purpose of construction requirements to ensure that services are provided promptly to the public.[23] We find that Havens has performed adequate due diligence and has provided evidence of several executed contracts reflecting that he has been actively exploring options for the deployment of LMS systems.[24] We reject Mobex's argument that Havens should have anticipated having to design and manufacture his own equipment, rather than relying on the only existing manufacturer at the time Havens bid for the spectrum.[25] In fact, Havens has provided evidence that he sought to obtain M-LMS equipment after the lone vendor of M-LMS equipment ceased to produce such equipment within the first year of the license term. Notwithstanding the availability of telematics, we find that there is an important public interest benefit in ensuring the utilization of M-LMS spectrum and promoting a variety of services to the public.

9. Mobex's also asserts that Havens' Waiver Request is similar to the requests which were denied in the *McCart* and *Hilltop Orders.*[26] We disagree. We note that neither party in the *McCart* and *Hilltop* cases had attempted to obtain equipment or remedy the lack of equipment, and in *Hilltop*, the extension request was filed nearly one year after the deadline had passed and the license had

---

[20] *See* Petition for Rulemaking filed by Progeny LMS, Inc. (*Progeny Petition),* RM-10403 (filed March 5, 2002) at 15-16.

[21] Mobex Comments at 5.

[22] "Telematics" refers to vehicle navigation systems, such as OnStar, where drivers and passengers employ GPS to obtain directions, track their location, and obtain assistance when a vehicle is in an accident.

[23] Mobex Comments at 6-8.

[24] *See* Havens' Reply Comments at 1-2, referring to his Request for Partial Waiver to Allow Ancillary Fixed Service, which was filed Nov. 26, 2003. We note that Havens withdrew this filing on July 27, 2004. On July 22, 2004, Havens gave an *ex parte* presentation to staff of the Wireless Telecommunications Bureau, and, on July 30, 2004, he submitted documentation in support of his due diligence claims. This documentation includes evidence of consulting contracts, agreements for engineering studies, and memorandums of understanding which Havens entered into beginning in the first year of the license term for the purpose of developing a LMS system. We note that this documentation was submitted along with a request for confidential treatment in accordance with Sections 0.457 and 0.459 of the Commission's rules.

[25] *See* Mobex Comments at 5.

[26] Mobex contends that Havens' request is similar to two waiver requests which were denied by the Mobility Division of the WTB, and its predecessor, the Commercial Wireless Division, because, as in those situations, Havens cannot state when equipment will be available to construct his facilities. Mobex Comments at 6. Mobex cites In the Matter of Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for Waiver of the Automatic License Cancellation of Call Sign KNNY348, *Order*, 19 FCC Rcd 2209 (WTB, MD 2004) (*McCart Order*), and In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station Call Sign WPNZ964, *Memorandum Opinion and Order*, 18 FCC Rcd 22055 (WTB, CWD 2003) (*Hilltop Order*).

automatically canceled. In contrast, Havens has undertaken efforts to develop M-LMS equipment. We also find that granting Havens' Waiver Request does not conflict with the Wireless Telecommunications Bureau's (WTB) decision in the *Nextel/Neoworld Order,*[27] as asserted by Mobex, where the WTB granted a sixteen-month extension of the construction deadline so that the affected licensees might deploy advanced digital systems that were not yet available. Specifically, licensees in the 900 MHz Specialized Mobile Radio (SMR) service could have used legacy equipment to meet construction requirements, but the construction of a more effective system would be possible by a certain date if an extension was granted.[28] We disagree with Mobex's assertion that the Commission has established a policy whereby requests for extensions of time to construct will not be granted unless the applicant has provided a "date certain" by which it will commence service.[29] In *Nextel/Neoworld*, legacy equipment was available and new equipment would be available by date certain. In this case, no equipment is available and Havens has provided the only evidence of possible equipment development.

10. We also note that the circumstances presented in this case are similar to previous instances in which we have granted extensions based upon equipment availability. For example, we have granted extensions of construction deadlines where licensees have demonstrated a commitment to deploying advanced technology under development and therefore unavailable in time to satisfy the licensee's construction benchmarks.[30] Similarly, we find that Havens has demonstrated a commitment to develop equipment and we also find Havens' failure to complete construction was due to causes beyond his control.

11. We find no merit in Mobex's argument that Havens' request is part of a pattern of delay in which he seeks to use his licenses in various bands for purposes other than those for which they are intended.[31] Such a conclusion is mere speculation and Havens does not seek a waiver of the technical M-LMS rules.[32] Further, we find that Mobex's argument that Havens' Waiver Request is in violation of

---

[27] *See* In the Matter of FCI 900, Inc. Expedited Request for Three-Year Extension of the 900 MHz Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of the 900 MHz Band Construction Requirements and Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (2001) (*Nextel/Neoworld Order*).

[28] Mobex essentially argues that relief was granted in the Nextel/Neoworld case due in part to the fact that they would obtain new equipment by a specific date, but Havens has not provided a date-certain guarantee of equipment. Mobex Comments at 5-6.

[29] *Id.* Mobex argues that the Commission has established this policy in the *McCart, Hilltop,* and *Nextel/Neoworld Orders*, as well as in the Matter of MARITEL, Inc. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, *Order*, 18 FCC Rcd 24670 (2003).

[30] *See Nextel/Neoworld Order;* Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (WTB, CWD 2001) ("*Leap Wireless"*) (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); Monet Mobile Networks, Inc., Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 6452 ("*Monet Mobile"*) (WTB, CWD 2002) (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); and Warren C. Havens, *et al.,* Request for Waiver or Extension of the Five-Year Construction Requirements for 220 MHz Phase II Licensees, *Memorandum Opinion and Order*, DA 04-2100 (adopted July 12, 2004) (granting extension of the five-year construction requirement for 220 MHz licensees to allow for the use of next-generation digital technology in the band).

[31] Mobex Comments at 8-10.

[32] In the event that Havens' future service violates our M-LMS rules, the Commission could take appropriate action.

Sections 1.946(e)(2) and 90.155(g) of the Commission's rules is misplaced.[33] These rules hold that extensions of time to construct or to commence service will not be granted for delays caused by the failure to timely order equipment; however, in this case there was no equipment available to order. We also reject Mobex's contention that a petition for rulemaking is needed for the requested extension.[34] Havens merely seeks an extension of the construction deadline for his licenses rather than global relief or wholesale change to the M-LMS rules.

12. Finally, Mobex contends that Havens' Reply Comments do not comply with Sections 1.49(b) and (c) of the Commission's rules and therefore should be dismissed.[35] Section 1.49(b) requires that all pleadings which exceed ten pages shall include a table of contents, and Section 1.49(c) requires that all such pleadings shall include a summary. As noted above, we have accepted Havens' belated filing of the required table of contents and summary, and we do not believe that his initial failure to comply warrants dismissal of the Waiver Request.[36]

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that Warren C. Havens' request for an extension of the five-year construction deadline for his M-LMS EA licenses, filed on December 3, 2003 and amended on July 14, 2004, is GRANTED, and that the construction deadline is hereby extended until July 14, 2007.

FEDERAL COMMUNICATIONS COMMISSION

Thomas Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

33 47 C.F.R. §§ 1.946(e)(2), 90.155(g).

34 Mobex Reply Comments at 3-4.

35 *Id.* at 4-6. 47 C.F.R. §§ 1.49(b) and (c).

36 *See supra* n.11.

NEXT DOCUMENT

EXHIBIT 2 FOLLOWS

Federal Communications Commission
Washington, D.C. 20554

March 3, 2005

FCR, Inc.
4832 Givens Court
Sarasota, FL 34242

DA-541

Attention: Bruce E. Fox

RE: Request for extension of five-year construction requirement
Call Signs: WPOJ871, WPOJ872, WPOJ873, WPOJ874 and WPOJ875

Dear Mr. Fox:

On June 18, 2004, you filed FCC Form 601 for the above referenced call signs[1] to request a three-year extension of time for FCR, Inc. (FCR) to meet the five-year construction requirement for its Multilateration Location and Monitoring Service (M-LMS) licenses authorized to operate in the 902-928 MHz M-LMS frequency band. For the reasons set forth below, we grant FCR's request.[2]

Pursuant to 1.946(e) of the Commission's rules,[3] an extension of time may be granted if the licensee shows failure to complete construction is due to causes beyond its control. You contend FCR has met the requirements of this provision because FCR has attempted to obtain equipment to meet its requirements, but there is no M-LMS equipment available.[4] You note M-LMS systems are unique because they must operate within particular technological parameters (*e.g.* co-existing with unlicensed devices and amateur radio service operations). As a result, the development of technology for this band has been extremely slow and there is no commercially viable M-LMS equipment currently available.[5] As further evidence to matters beyond FCR's control, you point out Progeny filed a Petition for Rulemaking with the Commission to change the M-LMS rules which has resulted in uncertainty in the band for any entity that would attempt to produce M-LMS equipment.[6]

[1] *See* Universal Licensing system file numbers 0001778449 through 0001778454.
[2] We note FCR's request was filed in a timely manner – the first construction deadline was July 14, 2004.
[3] 47 C.F.R. § 1.946.
[4] Request for Extension of Time, Exhibit 1.
[5] *Id.*
[6] *Id. at 2.*

On December 8, 2004, the Wireless Telecommunications Bureau granted Warren C. Havens (Havens), an M-LMS licensee, a three-year extension of his M-LMS five-year construction requirement. The relief was granted to Havens based upon the existence of "unique factual circumstances [specifically, the lack of commercially available M-LMS equipment] and strict application of the construction requirement would be contrary to the public interest."[7] FCR is similarly situated insofar as the unique sharing constraints presented by the M-LMS band have resulted in a lack of M-LMS equipment leaving FCR unable to fulfill its five-year construction requirement. As with Havens, we believe the three-year extension should be sufficient for M-LMS licensees to actively pursue equipment development to provide service within the three-year window. Accordingly, pursuant to section 1.946(e) of the Commission's rules, we find a three-year extension of the construction requirement will serve the public interest.[8]

Accordingly, FCR's five-year construction requirement is hereby extended until July 14, 2007 for each of the licenses referenced above.

Sincerely,

Thomas Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

[7] In the Matter of Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, DA No. 04-3864, 2004 WL 2848137 (FCC) (WTB Dec. 9, 2004), at ¶7

[8] *See* 47 C.F.R. 1.946(e).

NEXT DOCUMENT

EXHIBIT 3 FOLLOWS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request of Progeny LMS, LLC for a Three-Year	)	File Nos. 0002049041-0002049297
Extension of the Five–Year Construction	)	
Requirement for its Multilateration Location and	)	
Monitoring Services Economic Area Licenses	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2006 **Released: May 24, 2006**

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. For the reasons stated below, the Mobility Division (Division) hereby grants Progeny LMS, LLC (Progeny) a three-year extension of time, until July 19, 2008, to meet the five-year construction requirement for its multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses.[1]

2. *Background*. Progeny holds 228 M-LMS licenses, which have a five-year construction deadline of July 19, 2005.[2] On February 15, 2005, Progeny filed a request for a limited waiver of the requirement that M-LMS licensees construct and operate a sufficient number of base stations to serve one-third of an EA's population within five years of initial license grant (Extension Request).[3] Specifically, Progeny requests three additional years to meet this requirement because no M-LMS equipment exists for it to meet the five-year milestone.

3. Warren Havens, an M-LMS licensee, and three entities in which he is the majority interest holder and serves as President—Telesaurus Holdings GB, LLC (THL, an M-LMS licensee), Telesaurus VPC, LLC (TVL), and the AMTS Consortium LLC (ACL) (collectively,

[1] There are two types of LMS systems: multilateration systems and non-multilateration systems. Multilateration systems are licensed on a geographic area basis and track and locate objects over a wide area (*e.g.*, tracking a bus fleet) by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points, or from a number of fixed points to the unit that is to be located. Non-multilateration systems transmit data to and from objects passing through particular locations (*e.g.*, automated tolls), and are licensed on a site-by-site basis.

[2] Progeny acquired its licenses in Auction No. 21. *See* "Location and Monitoring Service Auction Closes, Winning Bidders in the Auction of 528 Multilateration Licenses in the Location and Monitoring Service," *Public Notice*, 14 FCC Rcd 3754 (1999).

[3] *See* Request for Waiver (filed Feb. 15, 2005). *See also* 47 C.F.R. § 90.155(d). An M-LMS licensee must cover two-thirds of an EA's population within ten years of initial license grant. *Id.*

with Mr. Havens, the "Havens Group")—oppose Progeny's request.[4] Specifically, on May 2, 2005, the Havens Group filed a request under Section 1.41 of the Commission's rules,[5] asking the Commission to place Progeny's Extension Request on public notice for comment. That filing also included a discussion of "facts and arguments" regarding the Extension Request, which the Havens Group asked the Commission to consider as "an informal petition to deny under Section 1.41" in the event that the Commission did not place the Extension Request on public notice. On June 2, 2005, Progeny filed an Opposition to Request for Public Notice or Alternative Action and an accompanying Motion to Accept Late-Filed Opposition.[6] On June 14, 2005, Havens filed an Informal Reply to Opposition to Request for Public Notice or Alternative Action.

4. The Havens Group and Progeny subsequently filed related pleadings, including Progeny's Reply to Opposition dated December 6, 2005, and the Havens Group's Reply to Response to Opposition dated December 13, 2005.[7] The parties also filed various pleadings relating to a Freedom of Information Act (FOIA) request of the Havens Group filed on June 14, 2005 regarding Progeny's request for confidential treatment of an attachment to its Extension Request. The Mobility Division granted in part and denied in part Progeny's request for confidential treatment and granted in part and denied in part the Havens Group's FOIA request.[8] In its pleadings, the Havens Group principally argues that Progeny did not make sufficient efforts to develop M-LMS equipment and that its request therefore should be denied.[9]

5. We note that in 2004, the Mobility Division granted Mr. Havens a three-year extension of time to meet the five-year construction requirement for his M-LMS licenses[10] and, in

[4] We also note that Intelligent Transportation & Monitoring Wireless LLC (ITM) joined in various pleadings filed by the Havens Group in November 2005 and thereafter. Mr. Havens is the majority interest holder, and serves as President, of ITM.

[5] 47 C.F.R. § 1.41.

[6] *See* 47 C.F.R. § 1.45(b) ("oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed"); 47 C.F.R. § 1.45(c) ("the person who filed the original pleading may reply to opposition within 5 days after the time for filing opposition has expired").

[7] *See* Havens Opposition Erratum Version (Nov. 30, 2005). The Havens Group filed numerous additional pleadings, including: Email to FCC Secretary (March 30, 2005), also filed via ECFS in RM-10403 (March 30, 2005); Request under Section 1.41 to Place on Public Notice or Alternative Action (May 2, 2005) (Havens Public Notice Pleading); Email to FCC Secretary (May 15, 2005), also filed via ECFS in RM-10403 (May 16, 2005); Informal Reply to Opposition to Request for Public Notice or Alternative Action (June 14, 2005); Opposition (Nov. 29, 2005); Reply to Response to Opposition (Dec. 13, 2005); a two-part Email, "Request to Progeny" and "Informal Request to Accept Possibly Late Filed Filing" (Dec. 13, 2005); Reply to Response to Opposition Erratum Version (Dec. 14, 2005) (Havens Reply Erratum Version); and a Request to Accept Possibly Late Filing of Reply to Response to Opposition (Jan 7, 2006). Progeny filed various responsive pleadings, including: Motion to Accept Late-Filed Opposition (June 2, 2005); Opposition to Request for Public Notice or Alternative Action (June 2, 2005); Response to Reply to Opposition Request (June 24, 2005); Reply to Opposition to Motion to Accept Late Filing (June 24, 2005); Motion to Withdraw Portions of Confidential Attachment (Nov. 18, 2005); and Reply to Opposition (Dec. 6, 2005).

[8] *See* Letter dated October 31, 2005, from Roger S. Noel, Chief, Mobility Division to Janice Obuchowski, counsel to Progeny, and Ari Q. Fitzgerald, counsel to the Havens Group (FOIA 2005-449 Letter Ruling).

[9] *See, e.g.*, Havens Reply Erratum Version at 6, 8.

[10] *See* In the Matter of Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (WTB MD 2004) (*Havens M-LMS Order*).

2005, granted FCR the same relief for certain of its M-LMS licenses.[11] We also note that the Commission recently released a notice of proposed rulemaking, partly in response to a petition for rulemaking filed by Progeny in 2002,[12] in which it has requested comment on possible refinements of the M-LMS rules.[13]

6. *Discussion*. We resolve three procedural matters before addressing the substance of Progeny's Extension Request. First, we note that Progeny and the Havens Group each filed one or more untimely pleadings in this proceeding.[14] Although the Commission generally does not accept late-filed pleadings, we find that for the sole purpose of adjudicating this matter, the public 1interest would be served by our consideration of the full record and therefore accept such pleadings.

7. Second, we reject the Havens Group's request under Section 1.41 of the Commission's rules to place the Extension Request on public notice.[15] Under Section 1.933(d)(5) of the Commission's rules, requests for extensions of time to complete construction need not be placed on public notice prior to grant.[16] We note that Mr. Havens request in 2003 was the first request of any M-LMS licensee for an extension of time to meet the M-LMS construction requirements. At that time, the Commission had limited information before it upon which to make an informed judgment regarding the state of M-LMS equipment availability and placed Haven's request on public notice for comment.[17] By contrast, in this proceeding there is an extensive record, which is sufficient to resolve all issues before us, and there is no compelling need to request comment on the Extension Request via public notice as the Havens Group urges. Finally, we note that the Havens Group's filing of numerous pleadings[18] demonstrates that the lack of a public notice has not hindered its participation in this proceeding. Accordingly, we reject the Havens Group's request for public notice of the Extension Request.

8. Third, we note that Progeny requested confidential treatment of Attachment B to its Extension Request, which enumerates various efforts to develop M-LMS equipment and applications. The Mobility Division determined that certain information in Attachment B was subject to disclosure under the FOIA, while the remainder was exempt from disclosure.[19] The

[11] *See also* Request for Extension of Five-Year Construction Requirement Call Signs: WPOJ871, WPOJ872, WPOJ873, WPOJ874 and WPOJ875, *Letter*, 20 FCC Rcd 4293 (WTB MD 2005) (*FCR M-LMS Letter*), *petition for reconsideration pending*.

[12] *See* "Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Location and Monitoring Service Rules," *Public Notice*, RM No. 10403, 17 FCC Rcd 6438 (2002).

[13] *See* In the Matter of Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket No. 06-49, *Notice of Proposed Rulemaking*, FCC 06-24, 2006 WL 543059 (F.C.C.) (rel. March 7, 2006),

[14] *See supra* note 7.

[15] *See* 47 CFR § 1.41; Havens Public Notice Pleading at 3 (noting that the request of Mr. Havens for similar relief was placed on public notice).

[16] 47 CFR § 1.933(d)(5).

[17] *See* "Wireless Telecommunications Bureau, Mobility Division Seeks Comment on Warren C. Havens' Request for Waiver of Multilateration Location and Monitoring Service Five-Year Construction Requirement," *Public Notice*, 19 FCC Rcd 4802 (WTB MD 2004).

[18] *See supra* note 7.

[19] *See* FOIA 2005-449 Letter Ruling.

Havens Group and Progeny waived their rights to appeal that determination and Progeny filed a request to withdraw Sections 3, 4, and 5 of Attachment B.[20] Accordingly, we do not consider Section 3, 4, or 5 of Attachment B in this proceeding.

9. We now turn to the substance of Progeny's Extension Request. Under Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,[21] an M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirement, unless it obtains an extension of time to construct under Section 1.946(e) of the Commission's rules,[22] or a waiver of the construction requirement under Section 1.925 of the Commission's rules.[23]

10. Progeny states that through its employees and consultants, it has conducted discussions with an array of U.S. manufacturers of telecommunications equipment, including both established suppliers and entrepreneurial firms.[24] It states that despite such efforts, it has been unable to secure M-LMS equipment and that no equipment is available to meet the construction requirement. Progeny notes that it has had discussions with the Department of Homeland Security as well as other potential users of its M-LMS spectrum, and that an extension of time could foster the development of applications and equipment, including for public safety and homeland security, and thereby put this spectrum to productive use.[25]

11. The Havens Group contends that Progeny's efforts to develop M-LMS equipment and applications do no not warrant an extension of time to construct.[26] As a threshold matter, we reject their claim that Progeny's filing of a petition for rulemaking seeking more flexible M-LMS rules in 2002[27] undercuts Progeny's demonstrable efforts to develop M-LMS equipment and applications.[28] Progeny, in fact, agrees that its filing of the petition did not relieve the company of its responsibilities and it therefore sought to develop M-LMS equipment and applications.[29]

12. The Havens Group also argues that Progeny must provide evidence of in-person

[20] *See* Motion to Withdraw Portions of Confidential Attachment.

[21] 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

[22] An extension of time to complete construction may be granted where the licensee demonstrates that the failure to complete construction is due to causes beyond its control. 47 C.F.R. § 1.946.

[23] Under Section 1.925 of the Commission's rules, a waiver may be granted provided the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925.

[24] *See, e.g.*, Extension Request at iii.

[25] *See id.* at 3, 9, 13.

[26] *See* Havens Reply Erratum Version.

[27] *See supra* note 12.

[28] *See, e.g.*, Havens Opposition Erratum Version at 3.

[29] *See* Extension Request at 5; Reply to Opposition at 5. We note that the Commission has invited interested parties to comment on possible changes to the M-LMS rules in WT Docket No. 06-49. Comments and reply comments in that proceeding currently are due May 30 and June 30, 2006, respectively.

meetings, file affidavits regarding its efforts to development equipment, and provide evidence of nondisclosure agreements with potential equipment vendors.[30] There is no requirement that Progeny submit such information in support of its Extension Request. The record, moreover, demonstrates that Progeny sought to develop equipment and applications for its M-LMS spectrum but, like Mr. Havens and FCR, has been unsuccessful.[31] For example, Progeny retained third parties to explore equipment and applications development,[32] contacted numerous entities itself regarding such development,[33] and consulted various equipment vendors and developers.[34]

13. Our analysis of whether Progeny has justified its Extension Request, moreover, is not limited to its efforts to develop M-LMS equipment and applications. We agree with Progeny that three factors that supported our decision to grant Mr. Havens a three-year extension of time to construct his M-LMS licenses apply equally to Progeny.[35] First, the lack of available M-LMS equipment continues to make construction impossible.[36] Second, the five-year construction requirement substantially precedes the initial renewal deadline of the M-LMS licenses.[37] And third, spectrum sharing in the M-LMS band—among government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations—has hindered the ability of licensees to secure equipment.[38]

A sufficient showing of due diligence and ability to construct were part of the basis for granting the Warren Havens extension request in 2004.

14. Lastly, we reject the Havens Group's claim that precedent requires denial of Progeny's Extension Request. The cases they cite are inapposite. For example, unlike the licensees in *McCart* and *Hilltop,* whose extension requests were denied,[39] Progeny has actively

[30] *See* Havens Reply Erratum Version at 8-11.

[31] *See* Extension Request at 13 (noting that Progeny has had "discussions with the Department of Homeland Security, businesses with location monitoring requirements, equipment makers and critical infrastructure entities").

[32] *See* FOIA 2005-449 Letter Ruling at 3 (the redacted material following the eight bullet points after paragraph 3 on page one of Attachment B identifies such entities). The Havens Group mistakenly asserts that Progeny did not identify its intermediaries with would-be vendors, manufacturers or end users. *See* Havens Reply Erratum Version at 9.

[33] *See* FOIA 2005-449 Letter Ruling at 3 (the redacted material following the 35 bullet points on page two of Attachment B identifies such entities).

[34] *Id.* (the redacted material following the 13 bullet points after the first sentence on page three of Attachment B identifies such entities).

[35] *See* Reply to Opposition at 6.

[36] *Havens M-LMS Order,* 19 FCC Rcd at 23744 ¶7. According to the Commission's equipment authorization records, there is no M-LMS equipment available for use in the United States at this time.

[37] *Id.*

[38] *Id.* M-LMS operations may not cause interference to and must tolerate interference from ISM devices and radiolocation Government stations that operate in the 902-928 MHz band. 47 C.F.R. § 90.353(a). M-LMS licensees, moreover, are required to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to Part 15 devices. 47 C.F.R. § 90.353(d). *See also FCR Letter*, 20 FCC Rcd 4293 (noting that "the unique sharing constraints presented by the M-LMS band have resulted in a lack of M-LMS equipment leaving FCR unable to fulfill its five-year construction requirement").

[39] *See, e.g.*, Havens Opposition Erratum Version at 8, citing In the Matter of Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for Waiver of the Automatic License Cancellation of Call Sign KNNY348, *Order*, 19 FCC Rcd 2209 (WTB MD 2004) (*McCart Order*) and In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service

sought to develop M-LMS equipment and applications.[40] In *McCart*, equipment was available, but it was unclear whether the licensee could not deploy it for technical reasons or chose not to deploy it for business reasons.[41] In *Hilltop*, the licensee filed its extension request after its license automatically cancelled for failure to construct.[42] Progeny, by contrast, timely filed its Extension Request and its licenses are active.

15. The Havens Group's reliance on the *Redwood* and *Eldorado* orders, where extensions of time to construct PCS systems were denied, also is misplaced.[43] The lack of equipment in *Redwood* resulted from the licensee's disputes with a management company that it had retained to construct a system[44] while, in *Eldorado*, the licensee elected to deploy GSM equipment but failed to meet its deadline.[45] By contrast, notwithstanding Progeny's efforts (and those of Mr. Havens) to develop M-LMS equipment and applications, there is no M-LMS equipment available that would enable Progeny to satisfy its construction obligations. Finally, the *Motient* case does not support the Havens Group's assertion.[46] There, the licensee argued that declining general economic conditions should excuse its failure to construct and conceded that it did not have the resources to construct its licenses.[47] Progeny makes no such contentions in this proceeding. At bottom, none of the cases cited by the Havens Group is dispositive to our determination in the instant matter.

16. *Conclusion*. Based on the totality of the record and for the reasons stated above, we find that the failure to complete construction is due to causes beyond Progeny's control[48] and that the public interest would be served by granting it a three-year extension of time to construct its M-LMS licenses.[49] Further, based on the totality of the record and for the reasons stated above, we also find that strict application of the construction requirement would be contrary to the public interest, and that granting Progeny's request will serve the public interest.[50]

17. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's

---

Trunked Station Call Sign WPNZ964, *Memorandum Opinion and Order*, 18 FCC Rcd 22055 (WTB CWD 2003) (*Hilltop Order*).

[40] *See supra* paras. 10 and 12.

[41] *See McCart Order*, 19 FCC Rcd at 2211 ¶6.

[42] *See Hilltop Order,* 18 FCC Rcd at 2207 ¶6.

[43] *See* Havens Opposition Erratum Version at 7, citing In the Matter of Redwood Wireless Minnesota, L.L.C. and Redwood Wireless Wisconsin, L.L.C., *Order,* 17 FCC Rcd 22416 (WTB CWD 2002) (*Redwood Order*) and In the Matter of Eldorado Communications, L.L.C., *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (*Eldorado Order*).

[44] *See Redwood Order*, 17 FCC Rcd at 22419 ¶6.

[45] *See Eldorado Order*, 17 FCC Rcd at 24616 ¶7.

[46] *See* Havens Opposition Erratum Version at 7, citing In the Matter of Motient Communications Inc., *Order*, 19 FCC Rcd 13086 (WTB MD 2004) (*Motient Order*).

[47] *See Motient Order*, 19 FCC Rcd at 13092 ¶13.

[48] *See also Havens M-LMS Order*, 19 FCC Rcd at 23746 ¶10 ("failure to complete construction was due to causes beyond" the control of Havens).

[49] *See* 47 C.F.R. § 1.946.

[50] *See* 47 C.F.R. § 1.925.

rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), that the request of Progeny LMS, LLC, filed on February 15, 2005, for a three-year extension of time to meet the five-year construction requirement for its multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0002049041-0002049297, IS GRANTED, and that the construction deadline is HEREBY EXTENDED until July 19, 2008.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Thomas Derenge
Deputy Chief
Mobility Division
Wireless Telecommunications Bureau

NEXT DOCUMENT

EXHIBIT 4 FOLLOWS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
Multilateration Location and Monitoring	)
Service Construction Requirements	)

ORDER ON RECONSIDERATION, AND MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2007 **Released: January 31, 2007**

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. For the reasons stated below, the Mobility Division (Division) hereby denies the petitions for reconsideration filed by Warren Havens (Havens)[1] of the orders granting FCR, Inc. (FCR) and Progeny LMS, LLC (Progeny) three additional years to meet the five-year construction requirement for certain multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses.[2] We also grant requests for additional time to meet the 5-year requirement filed by various licenses. Further, on our own motion, we grant Telesaurus two additional years to meet the 5-year requirement for certain licenses (previously afforded more time to meet that requirement), and extend the 10-year requirement for such licenses two years.

I. BACKGROUND

2. In 1995, the Commission established LMS as a new service in the 902-928 MHz band, [3] which is shared by myriad users and allocated on a primary basis to federal radiolocation systems and Industrial, Scientific, and Medical (ISM) equipment. Federal fixed and mobile services are allocated next. M-LMS licensees are tertiary. Amateur radio operations are last in priority among licensed uses.[4] Part 15 unlicensed devices also intensively use the band.[5]

3. Multilateration LMS systems track and locate objects over a wide geographic area (*e.g.*, tracking a bus fleet) by measuring the difference in time of arrival or phase, of signals

[1] Three entities related to Havens —Telesaurus Holdings GB, LLC (Telesaurus), Telesaurus VPC, LLC (TVL), and the AMTS Consortium LLC (ACL) — joined in each petition. We refer to Havens, Telesaurus, TVL, and ACL collectively as Havens.

[2] An M-LMS licensee must cover one-third and two-thirds of an EA's population within five and ten years of initial license grant, respectively. *See* 47 C.F.R. § 90.155(d).

[3] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Report and Order*, 10 FCC Rcd 4695 (1995) (*LMS Report and Order).*

[4] 47 C.F.R. § 97.301.

[5] M-LMS licensees must demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to Part 15 devices 47 C.F.R. § 90.353(d).

transmitted from a unit to a number of fixed points, or from a number of fixed points to the unit that is to be located. Non-multilateration LMS systems transmit data to and from objects passing through particular locations (*e.g.*, automated tolls), and are licensed site-by-site.

4. The Commission auctioned M-LMS licenses in 1999 and 2001 (Auctions 21 and 39).[6] Licensees must construct and operate a sufficient number of base stations to serve one-third and two-thirds of an EA's population within five and ten years of initial license grant, respectively.[7] Under Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,[8] an M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirement, unless it obtains an extension of time to construct under Section 1.946(e),[9] or a waiver of the construction requirement under Section 1.925.[10] In 2003, Havens requested more time to meet the 5-year construction requirement. The Division granted Havens three additional years to meet the 5-year requirement,[11] and subsequently granted FCR and Progeny similar relief.[12] In March 2006, the Commission commenced a rulemaking regarding possible refinements of the M-LMS rules,[13] which is pending.

5. When the Commission adopted LMS rules in 1995, it expected that both M-LMS and non-multilateration LMS systems would play a central role in emerging advanced radio transportation-related services.[14] Non-multilateration systems flourished remarkably since 1995 with more than 2,000 sites licensed to state and local governments, railroads, and other entities. By contrast, no M-LMS licensee provides service today. The Commission's equipment authorization records, moreover, reveal that the FCC has approved only five M-LMS devices from 1996 to the present. And the record before us confirms that no viable M-LMS equipment is available for deployment in the United States today.

---

[6] "Location and Monitoring Service Auction Closes, Winning Bidders in the Auction of 528 Multilateration Licenses in the Location and Monitoring Service," *Public Notice,* 14 FCC Rcd 3754 (1999); Public Coast and Location and Monitoring Service Spectrum Auction Closes, Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 12509 (2001).

[7] 47 C.F.R. § 90.155(d). .

[8] 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

[9] An extension of time to complete construction may be granted where the licensee demonstrates that the failure to complete construction is due to causes beyond its control. 47 C.F.R. § 1.946.

[10] Under Section 1.925, a waiver may be granted provided the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925.

[11] Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (WTB MD 2004) (*Havens M-LMS Order*).

[12] Request for Extension of Five-Year Construction Requirement, *Letter*, 20 FCC Rcd 4293 (WTB MD 2005) (*FCR Order*); Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location And Monitoring Services Economic Area Licenses, *Memorandum Opinion and Order*, 21 FCC Rcd 5928 (WTB MD 2006) (*Progeny Order*).

[13] Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket No. 06-49, *Notice of Proposed Rulemaking*, 21 FCC Rcd 2809 (2006).

[14] *LMS Report and Order*, 10 FCC Rcd at 4698 ¶ 5.

II. DISCUSSION

6. We deny Havens Petition for Reconsideration of the *FCR Order*.[15] Foremost, as Havens acknowledges, there is no M-LMS equipment available for deployment in the United States. And, as noted in the *FCR Order*, "the unique sharing constraints presented by the M-LMS band have resulted in a lack of M-LMS equipment leaving FCR unable to fulfill its five-year construction requirement."[16] We find no basis on the record before us to overturn the *FCR Order*.

7. We deny Havens' Petition for Reconsideration of the *Progeny Order*.[17] We note that the record demonstrates that Progeny made varied efforts to develop M-LMS equipment and applications, but to no avail. Factors that supported the grant of additional time to Havens apply equally to Progeny, including the lack of available M-LMS equipment make construction impossible,[18] and complex spectrum sharing hindering the ability to secure such equipment.[19]

8. We have reviewed the request of Helen Wong-Armijo, filed September 14, 2006, for three additional years to meet the 5-year requirement, and find that the failure to complete construction is due to causes beyond her control,[20] and that the public interest would be served by granting her more time to construct.[21] Further, based on the totality of the record, we find that strict application of the construction requirement would be contrary to the public interest, and that granting additional time to construct will serve the public interest.[22]

9. We have reviewed the request of FCR, filed September 14, 2006, for three additional years to meet the 5-year requirement for certain licenses, and find that the failure to complete construction is due to causes beyond its control,[23] and that the public interest would be served by granting it a three-year extension of time.[24] Further, based on the totality of the record, we find that strict application of the construction requirement would be contrary to the public interest, and that granting additional time to construct will serve the public interest.[25]

10. We have reviewed FCR's request, filed January 18, 2007, for two more years to meet the 5-year requirement for five licenses previously afforded three additional years to meet that requirement. We find that the failure to complete construction is due to causes beyond its

---

[15] *See* Havens Petition for Reconsideration or Alternative Action, Erratum Version (Apr. 4, 2005).

[16] 20 FCC Rcd 4293.

[17] Havens also filed a Reply to Opposition (filed July 13, 2006), and an Amended Reply to Opposition (filed July 19, 2006). Progeny filed an Opposition to Petition for Reconsideration (filed July 3, 2006), and an Amended Opposition to Petition for Reconsideration (filed July 5, 2006).

[18] *Havens M-LMS Order,* 19 FCC Rcd at 23744 ¶7.

[19] *See supra* para 2.

[20] *See also Havens M-LMS Order*, 19 FCC Rcd at 23746 ¶10 ("failure to complete construction was due to causes beyond" the control of Havens).

[21] *See* 47 C.F.R. § 1.946.

[22] *See* 47 C.F.R. § 1.925.

[23] *See also Havens M-LMS Order*, 19 FCC Rcd at 23746 ¶10 ("failure to complete construction was due to causes beyond" the control of Havens).

[24] *See* 47 C.F.R. § 1.946.

[25] *See* 47 C.F.R. § 1.925.

control,[26] and that the public interest would be served by granting it additional time.[27] Further, based on the totality of the record, we find that strict application of the construction requirement would be contrary to the public interest, and that granting additional time to construct will serve the public interest.[28] We also, on our own motion, extend the 10-year requirement for such licenses by two years.

11. We have reviewed the request of Telesaurus, filed October 4, 2006, for three additional years to meet the 5-year requirement for certain licenses, and find that the failure to complete construction is due to causes beyond its control,[29] and that the public interest would be served by granting it a three-year extension of time.[30] Further, based on the totality of the record, we find that strict application of the construction requirement would be contrary to the public interest, and that granting additional time to construct will serve the public interest.[31] We decline to find that Telesaurus's opposition to the pending rulemaking regarding possible refinements of the M-LMS rules warrants its request for more time to construct.

12. Finally, on our own motion, we grant Telesaurus two additional years to meet the 5-year requirement for certain licenses (previously afforded more time to meet the requirement). We take this action *sue sponte* because there is less than six months remaining for Telesaurus to meet the construction requirement and no M-LMS equipment is available to meet this obligation. We also, on our own motion, extend the 10-year requirement for such licenses by two years.

III. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration or Alternative Action, of Telesaurus Holdings GB, LLC, et al., Erratum, April 4, 2005, and the Petition for Reconsideration of Telesaurus Holdings GB, LLC, et al., filed June 23, 2006, ARE DENIED.

14. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), that the request of FCR, Inc., filed on September 14, 2006, for a three-year extension of time to meet the five-year construction requirement for its multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0002752062 - 0002752069, IS GRANTED, and that the construction deadline is HEREBY EXTENDED until October 5, 2009.

15. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's

[26] *See also Havens M-LMS Order*, 19 FCC Rcd at 23746 ¶10 ("failure to complete construction was due to causes beyond" the control of Havens).

[27] *See* 47 C.F.R. § 1.946.

[28] *See* 47 C.F.R. § 1.925.

[29] *See also Havens M-LMS Order*, 19 FCC Rcd at 23746 ¶10 ("failure to complete construction was due to causes beyond" the control of Havens).

[30] *See* 47 C.F.R. § 1.946.

[31] *See* 47 C.F.R. § 1.925.

rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), that the request of FCR, Inc., filed on January 18, 2007, for additional time to meet the five-year construction requirement for its multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0002882775 - 0002882779, IS GRANTED, and that the construction deadline is HEREBY EXTENDED until July 14, 2009.

16. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), that FCR, Inc., BE GRANTED additional time to meet the ten-year construction requirement for multilateration Location and Monitoring Service Economic Area licenses, Call Signs WPOJ871 - WPOJ875, and that the construction deadline is HEREBY EXTENDED until July 14, 2011.

17. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), that the request of Helen Wong-Armijo, filed on September 14, 2006, for a three-year extension of time to meet the five-year construction requirement for certain multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0002751940 - 0002752023, IS GRANTED, and that the construction deadline is HEREBY EXTENDED until October 5, 2009.

18. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), that the request of Telesaurus Holdings GB, LLC, filed on October 4, 2006, for a three-year extension of time to meet the five-year construction requirement for certain multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0002775136 - 0002775178, IS GRANTED, and that the construction deadline is HEREBY EXTENDED until October 5, 2009.

19. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), that Telesaurus Holdings GB, LLC, BE GRANTED additional time to meet the five-year construction requirement for certain multilateration Location and Monitoring Service Economic Area licenses, Call Signs WPOJ876 - WPOJ927, and that the five-year construction deadline is HEREBY EXTENDED until July 14, 2009.

20. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), that Telesaurus Holdings GB, LLC, BE GRANTED additional time to meet the ten-year construction requirement for certain multilateration Location and Monitoring Service Economic Area licenses, Call Signs WPOJ876 - WPOJ927, and that the ten-year construction deadline is HEREBY EXTENDED until July 14, 2011.

21. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

NEXT DOCUMENT

EXHIBIT 5 FOLLOWS

EXHIBIT 5

SQUIRE, SANDERS & DEMPSEY L.L.P.

Suite 500
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Office: +1.202.626.6600
Fax: +1.202.626.6780

Direct Dial: 202.626.6615
bolcott@ssd.com

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

October 7, 2008

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Progeny LMS, LLC
Permitted Oral *Ex Parte* Presentation
WT Docket No. 08-60

Dear Ms. Dortch:

On October 6, 2008, Amy Mehlman, of Mehlman Capitol Strategies, Inc., spoke with Charles Mathias, legal advisor to Chairman Martin, regarding the applications of Progeny LMS, LLC for additional time to construct its licensed M-LMS network. Mehlman discussed the procedural history of Progeny's applications and briefly summarized the issues that have been raised in the proceeding, all of which are discussed at length in Progeny's written pleadings in this proceeding.

Please contact the undersigned if you have any questions.

Sincerely,

Bruce A. Olcott

NEXT DOCUMENT

EXHIBIT 6 FOLLOWS

Federal Communications Commission
Washington, D.C. 20554

September 19, 2008

BY CERTIFIED MAIL/RETURN RECEIPT REQUESTED and E-MAIL

Warren Havens, President, warren.havens@sbcglobal.net
Intelligent Transport, Location & Wireless Group
2649 Benvenue Avenue, Suites ## 2-6
Berkeley, CA 94704

Re: FOIA Control No. 2008-683

Dear Mr. Havens:

This letter and the enclosed documents respond to your Freedom of Information Act (FOIA) request that the Federal Communications Commission (Commission or FCC) FOIA Control Staff acknowledged on August 21, 2008.

Paragraphs "1" and "2" of the request pose questions regarding FOIA 2008-613, which were addressed previously.[1]

Paragraph "3" of the request seeks documents regarding the request of Progeny LMS, LLC (Progeny) for additional time to meet the construction requirements for its Multilateration Location and Monitoring Services licenses (Progeny Request).[2] Specifically, you request "documents reflecting communications between Progeny and FCC staff relating to Attachment A," to the Progeny Request.[3] You also seek "any other document Progeny submitted with" the Progeny Request "that is not on ULS." In response to your request, FCC staff located 26 pages of documents, all of which are enclosed (numbered 000001-000026).

Under Sections 0.466, 0.467, and 0.470 of the Commission's rules, 47 C.F.R. §§ 0.466, 0.467, and 0.470, fees may be assessed to process a FOIA request and duplicate documents that are produced to a requestor. Although costs were incurred to process your request and duplicate the enclosed documents, we are not charging a fee because the estimated cost of separately billing/collecting that fee may exceed the fee itself.

---

[1] *See* E-mail from Richard Arsenault, Chief Counsel, Mobility Division, Wireless Telecommunications Bureau, FCC, to Warren Havens, President, Skybridge Spectrum Foundation (Aug. 20, 2008).
[2] *See* "Wireless Telecommunications Bureau Seeks Comment on Request of Progeny LMS, LLC for Waiver of Location and Monitoring Service (LMS) Construction Rule," WT Docket 08-60, *Public Notice*, 23 FCC Rcd 7368 (2008).
[3] We provided Skybridge Spectrum Foundation and all other parties to WT Docket 08-60 a minimally-redacted version of Attachment A on August 15, 2008, FOIA 2008-613.

The undersigned official is responsible for this response. If you believe this response constitutes a denial of your request, you may file an application for review of this decision with the Commission's Office of General Counsel within 30 calendar days of the date of this letter pursuant to Section 0.461 of the Commission's rules, 47 C.F.R. § 0.461.

If you have any questions regarding the foregoing, please contact Richard Arsenault, Chief Counsel, Mobility Division, 202 418-0920 (richard.arsenault@fcc.gov).

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

cc: Shoko Hair

Richard Arsenault

From: Olcott, Bruce A. [BOlcott@ssd.com]
Sent: Wednesday, August 13, 2008 9:57 AM
To: Richard Arsenault
Subject: RE: FOIA Request

With this email, Progeny LMS, through its legal counsel, consents to the Wireless Telecommunications Bureau's release of the redacted document that you provided in your email below to the parties in WT Docket No.
08-60. Please let me know if you have any questions. Thank you for taking care of this on your week off.
Best regards,
Bruce A. Olcott
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 626-6615
Mobile: (703) 216-3910
Fax: (202) 626-6780
bolcott@ssd.com

-----Original Message-----
From: Richard Arsenault [mailto:Richard.Arsenault@fcc.gov]
Sent: Tuesday, August 12, 2008 10:24 PM
To: Olcott, Bruce A.
Cc: Richard Arsenault
Subject: FOIA Request

August 12, 2008

Dear Mr. Olcott:

As discussed earlier today, please provide confirmation by return email that Progeny LMS consents to the Wireless Telecommunications Bureau's release of the redacted document attached above.

Following receipt of such confirmation, the Bureau will issue a FOIA letter ruling specifying the legal bases for withholding the redacted material from public inspection. The letter ruling and the redacted document will be sent by email (and regular mail) to Mr. Warren Havens with an email copy to the other parties in WT Docket 08-60. The letter ruling will advise that any party to WT Docket 08-60 may, within five business days, file supplemental comments based on such information.

Thank you.

Richard Arsenault, Chief Counsel
Mobility Division, 202 418 0920

000002

Richard Arsenault

From: Richard Arsenault
Sent: Tuesday, August 12, 2008 10:24 PM
To: bolcott@ssd.com
Cc: Richard Arsenault
Subject: FOIA Request
Attachments: Progeny LMS Att A - redacted.pdf

August 12, 2008

Dear Mr. Olcott:
As discussed earlier today, please provide confirmation by return email that Progeny LMS consents to the Wireless Telecommunications Bureau's release of the redacted document attached above.

Following receipt of such confirmation, the Bureau will issue a FOIA letter ruling specifying the legal bases for withholding the redacted material from public inspection. The letter ruling and the redacted document will be sent by email (and regular mail) to Mr. Warren Havens with an email copy to the other parties in WT Docket 08-60. The letter ruling will advise that any party to WT Docket 08-60 may, within five business days, file supplemental comments based on such information.

Thank you.

Richard Arsenault, Chief Counsel
Mobility Division, 202 418 0920

In addition to the activities described in the Extension Request, Progeny also sought to develop a straightforward adaptation of an existing wireless standard, modified to accommodate the 900 MHz frequency and the LMS-specific requirements.

In pursuit of this goal, on May 1, 2007, Progeny contracted with [redacted] for a total contract price of $[redacted] plus certain out of pocket expenses. The contractor was to develop and produce, subject to certain technical and regulatory developments, a 900 MHz version of the [redacted]. The contractor was to evaluate [redacted] and alternative methods for multilateration. Both mobile and base station equipment developed under the contract would be designed to operate within the limits proposed by Progeny to the Commission in an *ex parte* letter on April 3, 2007.[1]

However, following a meeting with members of the Commission staff on February 1, 2008, it became apparent that the Commission was unprepared to accept Progeny's April 3, 2007 proposals or anything similar to them at this time. The contract was therefore terminated effective March 5, 2008. The cost of the abandoned project, including subcontractors and consultants, has not yet been finally determined. It is estimated to be approximately $[redacted].

[1] *See Ex Parte of Progeny LMS, LLC*, WT Docket 06-49 (Apr. 3, 2007).

000004

Richard Arsenault

From: Olcott, Bruce A. [BOlcott@ssd.com]
Sent: Monday, August 11, 2008 3:02 PM
To: Richard Arsenault
Subject: RE: Progeny FOIA Matter

Any developments on the Progeny confidential filing matter?
Thanks,
Bruce

From: Olcott, Bruce A.
Sent: Thursday, August 07, 2008 10:30 AM
To: 'Richard.Arsenault@fcc.gov'
Cc: Guyan, Joshua T.
Subject: Progeny FOIA Matter

Please find attached another case that supports our position regarding the confidential nature of Progeny's stated assessment of its likelihood of success in securing Commission approval of the technical approach that it was investigating as a part of its development contract with WiNetworks. The attached case deemed confidential under FOIA Exemption 4 a series of letters that were provided to the Department of Commerce by representatives of U.S. lumber companies. Among the information that was contained in the letters that was found by the court to be confidential was "the U.S. lumber industry's views regarding the status of negotiations between the United States and Canada" regarding lumber trade disputes. 473 F.3d 312, 319. As in our case, what was found to be confidential by the court was the stated opinion of the disclosing party regarding the actions that a U.S. government agency may or may not take with respect to a competitive industry.

The referenced case is attached. The relevant discussion at pages 4-5 of the attached has been highlighted for your convenience. Please let us know if you have any questions.

Thanks,
Bruce A. Olcott
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 626-6615
Mobile: (703) 216-3910
Fax: (202) 626-6780
bolcott@ssd.com

<< File: Baker Hostetler FOIA Case.doc >>

000005

Richard Arsenault

From: Olcott, Bruce A. [BOlcott@ssd.com]
Sent: Thursday, August 07, 2008 10:30 AM
To: Richard Arsenault
Cc: Guyan, Joshua T.
Subject: Progeny FOIA Matter
Attachments: Baker Hostetler FOIA Case.doc

Please find attached another case that supports our position regarding the confidential nature of Progeny's stated assessment of its likelihood of success in securing Commission approval of the technical approach that it was investigating as a part of its development contract with WiNetworks. The attached case deemed confidential under FOIA Exemption 4 a series of letters that were provided to the Department of Commerce by representatives of U.S. lumber companies. Among the information that was contained in the letters that was found by the court to be confidential was "the U.S. lumber industry's views regarding the status of negotiations between the United States and Canada" regarding lumber trade disputes. 473 F.3d 312, 319. As in our case, what was found to be confidential by the court was the stated opinion of the disclosing party regarding the actions that a U.S. government agency may or may not take with respect to a competitive industry.

The referenced case is attached. The relevant discussion at pages 4-5 of the attached has been highlighted for your convenience. Please let us know if you have any questions.

Thanks,

Bruce A. Olcott
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 626-6615
Mobile: (703) 216-3910
Fax: (202) 626-6780
bolcott@ssd.com

<<Baker Hostetler FOIA Case.doc>>

FOCUS - 6 of 52 DOCUMENTS

BAKER & HOSTETLER LLP, APPELLANT v. UNITED STATES DEPARTMENT OF COMMERCE, APPELLEE

No. 05-5185 Consolidated with 05-5350

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

374 U.S. App. D.C. 172; 473 F.3d 312; 2006 U.S. App. LEXIS 31454

September 14, 2006, Argued
December 22, 2006, Decided

SUBSEQUENT HISTORY: Motion denied by *Baker & Hostetler LLP v. United States DOC, 374 U.S. App. D.C. 107, 471 F.3d 1355, 2006 U.S. App. LEXIS 31455 (D.C. Cir., Dec. 22, 2006)*

PRIOR HISTORY: [**1] Appeals from the United States District Court for the District of Columbia. (No. 02cv02522).
Baker & Hostetler LLP v. DOC, 2006 U.S. App. LEXIS 23449 (D.C. Cir., Sept. 13, 2006)

COUNSEL: Mark A. Cymrot argued the cause for appellant. With him on the briefs were Elliot J. Feldman and Michael S. Snarr.

Claire M. Whitaker, Assistant U.S. Attorney, U.S. Attorney's Office, argued the cause for appellee. With her on the brief were Kenneth L. Wainstein, U.S. Attorney at the time the brief was filed, and Michael J. Ryan, Assistant U.S. Attorney. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

JUDGES: Before: HENDERSON, GARLAND and KAVANAUGH, Circuit Judges. Opinion for the Court filed by Circuit Judge KAVANAUGH in which Circuit Judge GARLAND joins and Circuit Judge HENDERSON joins as to Parts I-IV. Opinion dissenting in part filed by Circuit Judge HENDERSON.

OPINION BY: KAVANAUGH

OPINION

[*314] KAVANAUGH, *Circuit Judge*: This Freedom of Information Act appeal is a footnote to the long trade dispute in which the United States and American softwood lumber companies have raised complaints about alleged unfair trade practices by the Canadian Government and Canadian softwood lumber exporters. The United States and Canada recently settled the trade disagreement, but this FOIA case [**2] lives on.

In 2002, the Department of Commerce imposed duties on imports of Canadian softwood lumber to the United States (duties that have since been rescinded as a result of the recent bilateral settlement). Later in 2002, the law firm Baker Hostetler, which represents Canadian softwood lumber companies, filed requests and a lawsuit under the Freedom of Information Act to obtain documents from the Department [*315] of Commerce related to the Department's investigation of Canadian softwood lumber imports. At issue in this appeal are 17 third-party letters that the Department had received from American lumber companies; the Department claimed FOIA Exemption 4, which covers confidential commercial information provided by outside parties to the Government. Also at issue are 51 sets of internal Department notes; the Department claimed FOIA Exemption 5, which applies to privileged government documents. The District Court concluded that the Department properly withheld the documents under those FOIA exemptions.

Applying settled legal principles to the unusual facts of this case, we affirm the District Court's judgment with respect to the 17 third-party letters, we affirm with respect to one [**3] of the 51 sets of notes, and we reverse and remand for further proceedings with respect to 50 of the 51 sets of notes.

The Department has provided Baker Hostetler numerous other softwood-lumber-related documents that are not at issue on appeal. Because of its success in obtaining those documents, the firm argues it is a "complainant" that "substantially prevailed" in the overall FOIA litigation-meaning that it may receive attorney's fees from the Department under FOIA. *See 5 U.S.C. § 552(a)(4)(E)*. The District Court denied Baker Hostetler's

fee request, reasoning that the law firm is representing itself and thus is ineligible for fees. The plain language of the FOIA attorney's fees provision does not contain such an exception, however, and the Supreme Court has stated that an organization remains eligible for attorney's fees even when it represents itself in litigation. *See Kay v. Ehrler, 499 U.S. 432, 436 n.7, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)*. Two other Courts of Appeals have interpreted *Kay* to allow fees for a law firm representing itself. We agree with those courts and therefore reverse and remand for further proceedings on the attorney's [**4] fees issue; on remand, the District Court will determine whether Baker Hostetler "substantially prevailed" and is entitled to fees.

I

1. In the Tariff Act of 1930, Congress authorized the Department of Commerce to investigate (i) imports to the United States that are subsidized by foreign governments and (ii) dumping by foreign importers, which occurs when foreign companies sell their products in the United States at prices lower than in other markets. Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at *19 U.S.C. §§ 1202 et seq.*); *see 19 U.S.C. §§ 1671(a), 1671a, 1673, 1673a*. To counteract such trade practices by foreign governments and companies, the Department may impose countervailing and antidumping duties on goods imported into the United States. *Id. §§ 1671d, 1673d*. If duties are imposed, the affected foreign company may challenge the duties by seeking judicial review in the Court of International Trade. *Id. § 1516a(a)*.

During the course of an investigation of subsidies to or dumping by foreign importers, the Department must maintain a [**5] public record of certain meetings between Department officials and outside parties (those are known as "ex parte meetings"). *See id. § 1677f(a)(3)*; Department's Br. at 10 (Act requires Department to "create for the public record memoranda that recount" certain ex parte meetings). If the meeting is an ex parte meeting covered by the statute, the Department must list: the identity of persons present at the meeting; the date, time, and place of the meeting; and a summary of the matters discussed. [*316] *19 U.S.C. § 1677f(a)(3)*. By regulation, the Department keeps this public record in its Central Records Unit. *See 19 C.F.R. § 351.104(b) (2006)*.

In any lawsuit challenging the imposition of duties, the Court of International Trade bases its review on the full official record assembled during the investigation. *See 19 U.S.C. § 1516a(b)(1)(B)(i), 1516a(b)(2)(A)*; *see also 19 C.F.R. § 351.104(a)(1)* ("For purposes of [*19 U.S.C. § 1516a(b)(2)*], the record is the official record of each segment of the proceeding."). That record includes [**6] "a copy of all information presented to or obtained by the Secretary, the administering authority, or the [International Trade] Commission during the course of the administrative proceeding . . . ." *19 U.S.C. § 1516a(b)(2)(A)(i)*. However, "[t]he confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action" challenging an antidumping or countervailing duty determination, although "the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order." *Id. § 1516a(b)(2)(B)*.

2. In early 2002, after an investigation, the Department of Commerce announced its decision to impose duties on imports of Canadian softwood lumber. The law firm Baker Hostetler, which represents Canadian softwood lumber companies, then submitted two Freedom of Information Act requests for a variety of Department of Commerce documents related to the investigation.

The Department turned over a large number of responsive records, but it withheld some that it deemed to fall within FOIA's exemptions. As relevant here, the parties' disagreement [**7] concerned two specific groups of withheld records: 17 third-party letters sent to the Department by a representative of American lumber companies; and 51 sets of internal notes of meetings between Department officials and outsiders.

As to the 17 third-party letters, the Department invoked FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *5 U.S.C. § 552(b)(4)*. Baker Hostetler argued that Exemption 4 did not apply because the letters were not "commercial" within the meaning of FOIA. It also maintained that the letters were not "confidential" within the meaning of Exemption 4 because the Tariff Act requires the Department to include letters submitted in connection with the investigation in the official record assembled for judicial review. *See 19 U.S.C. § 1516a(b)(2)(A)*. The District Court determined that the letters were properly withheld. The court concluded that the letters contain confidential commercial information within the meaning of Exemption 4 and were submitted in connection with bilateral trade negotiations-not in connection with [**8] the Department's investigation of the Canadian companies-and thus were not subject to the Tariff Act's official record provision.

As to the 51 sets of meeting notes, the Department contended that they were protected by FOIA Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." *5 U.S.C. § 552(b)(5)*. That exemption incorporates the deliberative process component of executive privilege and protects

agency documents that are pre-decisional and deliberative. *See Judicial Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006)*. Baker Hostetler argued, however, that the Tariff Act's public record requirement mandates disclosure of certain information from the Department's [*317] "ex parte meetings" with outsiders and that the meetings described in the 51 sets of notes were covered by that statutory requirement. *See 19 U.S.C. § 1677f(a)(3)*. The Department responded that the meetings reflected in 50 of the 51 sets of notes were not covered by the statutory definition. In relevant part, the District Court agreed with the Department's [**9] position that the meetings in question were not "ex parte meetings" as defined by the statute; the court concluded that the notes therefore need not be disclosed.

The Department advanced a different rationale for withholding one set of notes taken by a senior Department official, Bernard Carreau, during a telephone call with a U.S. trade association. The Department argued that the Tariff Act's public record requirement did not apply to those notes because the telephone call concerned the overall trade settlement between the United States and Canada rather than the antidumping/countervailing duty investigation. Based on its in camera inspection of the notes, the District Court agreed and therefore concluded that the notes of the Carreau telephone call were properly withheld.

The District Court also decided two other issues relevant to this appeal. First, Baker Hostetler challenged the adequacy of the Department's search for responsive documents. The District Court concluded that the Department acted in good faith and conducted a reasonable search in response to Baker Hostetler's FOIA requests. Second, Baker Hostetler claimed that it was entitled to recover attorney's fees for its [**10] success in obtaining other documents in this litigation. *See 5 U.S.C. § 552(a)(4)(E)*. Without reaching the statutory question whether Baker Hostetler had "substantially prevailed" in the litigation, the District Court concluded that the law firm was not eligible for fees because it had represented itself.

On appeal, Baker Hostetler challenges the District Court's conclusions as to: the adequacy of the search; the withholding of the 17 third-party letters and 51 sets of meeting notes; and attorney's fees.

II

At the outset, we consider the District Court's jurisdiction. Baker Hostetler filed suit under the Freedom of Information Act and asked the court to order disclosure of certain Department of Commerce records. The Act provides that the United States District Court for the District of Columbia has jurisdiction over FOIA suits. *5 U.S.C. § 552(a)(4)(B)*. Therefore, the District Court had jurisdiction to decide this case, and we have jurisdiction over the appeal under *28 U.S.C. § 1291*.

We recognize that the Tariff Act grants the Court of International Trade "exclusive jurisdiction of any civil action commenced [**11] against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . administration and enforcement with respect to," among other things, "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *28 U.S.C. § 1581(i)(2), (4)*. The Tariff Act's exclusive-jurisdiction provision does not apply here, however, because this is a FOIA suit for disclosure of agency records. Baker Hostetler's complaint does not challenge the Department's "administration and enforcement" of duties. And the mere fact that some of the requested records relate to the Department of Commerce's decision to impose duties does not transform this FOIA suit for disclosure of records into a Tariff Act suit seeking relief from duties.

[*318] III

Baker Hostetler first contends that the Department of Commerce did not conduct an adequate search for responsive records. A FOIA search is sufficient if the agency makes "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs Serv., 315 U.S. App. D.C. 177, 71 F.3d 885, 890 (D.C. Cir. 1995)* [**12] (quotation marks omitted). An agency may establish the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts. *See Steinberg v. United States DOJ, 306 U.S. App. D.C. 240, 23 F.3d 548, 551 (D.C. Cir. 1994)*; *Goland v. CIA, 197 U.S. App. D.C. 25, 607 F.2d 339, 352 (D.C. Cir. 1978)*.

In this case, the District Court concluded that the Department conducted a sufficient search in response to Baker Hostetler's FOIA requests. Baker Hostetler asserts that the Department's failure to identify any responsive documents from certain high-level officials demonstrates that the Department did not perform a thorough search. But the District Court found that the Department "filed affidavits that describe in detail the manner and method of the searches conducted." Joint Appendix ("J.A.") 224. We agree with the District Court that the Department's procedure was reasonably calculated to generate responsive documents. Baker Hostetler's assertion that an adequate search would have yielded more documents is mere speculation. *See Steinberg, 23 F.3d at 552*.

Baker Hostetler also argues that the District Court erroneously excused the [**13] Department's failure to retrieve certain deleted emails. But the Department adequately explained its inability to recover those emails,

and Baker Hostetler's expert did not rebut that explanation. *See Goland, 607 F.2d at 352-55*; *see also Schrecker v. United States DOJ, 217 F. Supp. 2d 29, 35 (D.D.C. 2002)* ("Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains.").

Finally, Baker Hostetler contends that the Department's alleged bad faith in responding to its FOIA requests warranted discovery concerning the deleted emails. *See Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)* (citing *Goland, 607 F.2d at 355*). The District Court correctly determined, however, that Baker Hostetler offered no evidence of bad faith to justify additional discovery. *See Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001)* ("[A] mere assertion of bad faith is not sufficient to overcome a motion for summary judgment.") (citing *Hayden v. NSA, 197 U.S. App. D.C. 224, 608 F.2d 1381, 1387 (D.C. Cir. 1979)*); [**14] *see also SafeCard Servs., Inc. v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200 (D.C. Cir. 1991)* (district court has "broad discretion to manage the scope of discovery" in FOIA cases).

In sum, the District Court did not err in concluding that the Department conducted an adequate search in response to Baker Hostetler's FOIA requests.

IV

1. Under Exemption 4, FOIA's disclosure requirement "does not apply to . . . *commercial* or financial information obtained from a person and privileged or *confidential*." *5 U.S.C. § 552(b)(4)* (emphases added). The District Court held that the Department need not disclose 17 third-party letters submitted to the Department by the law firm Dewey Ballantine (on behalf of American lumber companies) because they contain confidential commercial information. Baker Hostetler contends that the information in the letters [*319] is neither "commercial" nor "confidential" under Exemption 4.

We must accept the District Court's factual descriptions of the contents of the letters unless the descriptions are clearly erroneous. *See Horowitz v. Peace Corps, 368 U.S. App. D.C. 192, 428 F.3d 271, 275, 277 (D.C. Cir. 2005)*. [**15] Furthermore, because "the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected." *King v. Dep't of Justice, 265 U.S. App. D.C. 62, 830 F.2d 210, 218 (D.C. Cir. 1987)* (footnote omitted). We therefore rely on the Department's descriptions in its *Vaughn* index and accompanying affidavit. We review de novo the District Court's conclusion that the letters as described fall within the FOIA exemption. *See, e.g., Spirko v. U.S. Postal Serv., 331 U.S. App. D.C. 178, 147 F.3d 992, 998 (D.C. Cir. 1998)*.

We first consider whether the 17 Dewey Ballantine letters contain commercial information within the meaning of Exemption 4. Contrary to Baker Hostetler's suggestion, Exemption 4 is *not* confined only to records that "reveal basic commercial operations . . . or relate to the income-producing aspects of a business." *Pub. Citizen Health Research Group v. FDA, 227 U.S. App. D.C. 151, 704 F.2d 1280, 1290 (D.C. Cir. 1983)*. The exemption reaches more broadly and applies (among other situations) [**16] when the provider of the information has a commercial interest in the information submitted to the agency. *See Nat'l Ass'n of Home Builders v. Norton, 353 U.S. App. D.C. 374, 309 F.3d 26, 38-39 (D.C. Cir. 2002)*. In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, for example, we held that a non-profit organization's reports describing the operations of its members' nuclear power plants contained "commercial" information. *265 U.S. App. D.C. 130, 830 F.2d 278, 281 (D.C. Cir. 1987)*. We stated that the "commercial fortunes" of member utilities "could be materially affected by the disclosure of health and safety problems experienced during the operation of nuclear power facilities." *Id.* We reached a similar result in *Public Citizen Health Research Group v. FDA*. We determined that lens manufacturers had a "commercial interest" in health and safety data submitted to the FDA because the data would be "instrumental in gaining marketing approval for their products." *704 F.2d at 1290*.

In this case, according to the Department's general summary of withheld documents (the *Vaughn* index), the 17 third-party letters contain "information that the submitter [**17] has voluntarily made available in confidence to the U.S. Government in connection with negotiations of a long-term agreement to resolve the trade dispute over softwood lumber and which is commercial and financial in nature." J.A. 277. The letters include "information about the domestic industry's commercial concerns," and they "reflect the commercial strengths and challenges faced by U.S. lumber companies in general, even outside the context of the negotiations." *Id.* Each letter contains at least one of the following: the association's assessment of the commercial strengths and weaknesses of the U.S. lumber industry; recommendations for settling or facilitating negotiations pertaining to the U.S. trade dispute with Canada; an analysis of the effect such measures would have on the commercial activities and competitive position of domestic lumber companies; the U.S. lumber industry's requirements for achieving a competitive softwood lumber market; the U.S. lumber industry's views regarding the status of negotiations between the United States and Canada; or a

description of the competitive challenges that domestic lumber companies face.

[*320] Under this Court's precedents construing Exemption [**18] 4, U.S. lumber companies have a "commercial interest" in such letters: The letters describe favorable market conditions for domestic companies, and their disclosure would help rivals to identify and exploit those companies' competitive weaknesses. *See Critical Mass Energy Project, 830 F.2d at 281*; *Pub. Citizen Health Research Group, 704 F.2d at 1290*. Therefore, the 17 third-party letters plainly contain commercial information within the meaning of Exemption 4.

We next consider whether the 17 letters are *confidential* under Exemption 4. When information is submitted to the Department voluntarily, "it will be treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 298 U.S. App. D.C. 8, 975 F.2d 871, 872 (D.C. Cir. 1992)* (en banc).

It is undisputed that Dewey Ballantine voluntarily submitted the letters and ordinarily would not have made the letters available to the public. Baker Hostetler claims, however, that the letters are not confidential because the Tariff Act requires that they be included [**19] within the official record of the Department's investigation for purposes of litigation challenging the duties. *See 19 U.S.C. § 1516a(b)(2)(A)(i)* (providing that the record for judicial review shall consist of "a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by [*19 U.S.C. § 1677f(a)(3)*]"). Baker Hostetler further assumes that the official record must be fully public.

Baker Hostetler's argument as to the confidentiality of the 17 letters fails for two independent reasons: *First*, the premise of Baker Hostetler's argument is wrong because the 17 third-party letters were not required to be included in the official record of this antidumping/countervailing duty investigation. After reviewing the letters, the District Court determined that they were submitted not in connection with the antidumping/countervailing duty investigation, but rather "to advance the [U.S. lumber industry's] positions on [**20] the terms of an overall settlement of an ongoing dispute between the U.S. and Canada on the importation of softwood lumber." J.A. 353.

Baker Hostetler claims that any distinction between trade negotiations and an antidumping/countervailing duty investigation is illusory. But Baker Hostetler's argument ignores the text and structure of the Tariff Act, which distinguishes trade negotiations from antidumping/countervailing duty investigations. *Compare 19 U.S.C. § 1516a* (governing "[j]udicial review in countervailing duty and antidumping duty proceedings") *with id. § 2155(g)* (addressing when information "submitted in confidence by the private sector or non-Federal government to officers or employees of the United States in connection with trade negotiations," including confidential "commercial or financial information," can be disclosed to certain Department officials). The statutory distinction between trade negotiations and antidumping/countervailing duty proceedings is consistent, moreover, with how trade negotiations and antidumping/countervailing duty investigations generally occur. When the United States negotiates a trade agreement, it commonly [**21] works in concert with American industries and seeks input about how a possible agreement would affect them. The line between trade negotiations and an antidumping/countervailing duty investigation [*321] reflects the reality that American industries are likely to provide input (such as the 17 letters here) in connection with trade negotiations while an antidumping/countervailing duty investigation is also occurring. *See* Seventh Declaration of Maria Dybczak PP 15-18 (J.A. 292-93).

Second, Baker Hostetler's argument as to a lack of confidentiality fails for a separate reason as well. The firm relies on the Tariff Act's official record requirement (which applies in judicial proceedings challenging the imposition of duties), but that provision has an exception that protects "confidential" material from routine disclosure. *See 19 U.S.C. § 1516a(b)(2)(B)*; *see also 19 C.F.R. § 351.104*; *A. Hirsh, Inc. v. United States, 11 C.I.T. 208, 657 F. Supp. 1297, 1302 (Ct. Int'l Trade 1987)* (analogizing *§ 1516a(b)* to other statutes that protect confidential commercial information, including FOIA Exemption 4, and explaining [**22] that "[r]elease of such materials to an adversary, whether or not under protective order, can seriously discourage parties from disclosing confidential information in the future"). Baker Hostetler's submission here boils down to a suggestion that a statute (the Tariff Act) that protects "confidential" material somehow overrides FOIA's protection of "confidential" material. That is not a winning argument-and on that independent ground as well, we reject Baker Hostetler's argument that the Tariff Act's official record requirement trumps the confidentiality of the 17 letters.

2. We turn next to the dispute over the 50 sets of meeting notes that the District Court found to be protected under FOIA Exemption 5 (there is a 51st set of notes we will consider separately in the next section). Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the

agency." *5 U.S.C. § 552(b)(5)*. Exemption 5 incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant. Those include, for example, the government attorney-client [**23] privilege, the government attorney work product protection, the presidential communications privilege, the state secrets privilege, and the deliberative process privilege. *See Judicial Watch, Inc. v. Dep't. of Justice, 361 U.S. App. D.C. 183, 365 F.3d 1108, 1109, 1113-14 (D.C. Cir. 2004)*; *Burka v. United States HHS, 318 U.S. App. D.C. 274, 87 F.3d 508, 516 (D.C. Cir. 1996)*.

This case involves the deliberative process privilege, which "protects agency documents that are both predecisional and deliberative." *Judicial Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006)*. As a general matter, notes taken by government officials often fall within the deliberative process privilege. *See Coastal States Gas Corp. v. Dep't of Energy, 199 U.S. App. D.C. 272, 617 F.2d 854, 866 (D.C. Cir. 1980)* (the deliberative process privilege covers "subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"). Notes generally are selective and deliberative-and routine public disclosure of meeting notes and other notes would hinder government officials from debating issues internally, deter them from [**24] giving candid advice, and lower the overall quality of the government decisionmaking process. *See, e.g., Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995)* ("Disclosure of this type of deliberative material inhibits open debate and discussion, and has a chilling effect on the free exchange of ideas."); *cf. Bureau of Nat'l Affairs, Inc. v. United States DOJ, 239 U.S. App. D.C. 331, 742 F.2d 1484, 1494 (D.C. Cir. 1984)* (recognizing possibility that notes might be withheld under Exemption 5 because of "the potential chilling effect that disclosure of [*322] handwritten notes might have on the activities of government employees").

On appeal, Baker Hostetler does not dispute that the 50 sets of notes are pre-decisional and deliberative, and ordinarily would be protected under the deliberative process privilege. Baker Hostetler instead argues that the Tariff Act requires public documentation of those ex parte meetings in the public record. The Department has not taken issue with this premise-namely, that the Department must disclose certain information contained in meeting notes to the extent the Tariff Act's public record requirement applies to these meetings. (There [**25] has been no suggestion, moreover, that the general public record requirement of Tariff Act *§ 1677f(a)(3)* somehow could be affected or limited by *§ 1516a(b)(2)(B)*'s protection for otherwise privileged materials in judicial proceedings challenging the imposition of duties. The Department has flatly stated that the record required by *§ 1677f(a)(3)* is a "*public* record." Department's Br. at 10 (emphasis added).) Throughout this FOIA litigation, the Department has turned over information covered by the public record provision of the Tariff Act, regardless whether such information otherwise might have been protected under the deliberative process privilege. *See, e.g.*, J.A. 246 (District Court's unchallenged order directing the Department to disclose matters discussed and persons in attendance at meetings); Department's Br. at 14 (Department "went beyond the [District Court's] order . . . and voluntarily disclosed information from *all* meetings concerning the administrative proceedings in the AD/CVD investigation, which included certain contacts that [the Department] did not consider subject to the Tariff Act's *ex parte* memorialization requirement"); Department's Br. [**26] at 17 (Department "has provided such information as the dates, names of participants, and the topics discussed during contacts on the AD/CVD proceedings"); Eighth Declaration of Maria Dybczak P 7 (J.A. 297-98) (Department "provided the information ordered [by the District Court] with respect to all meetings that could be described as pertaining to a[n] ex parte meeting as the agency interprets that requirement"); Def.'s Reply to Pl.'s Resp. to Def.'s Report to the Court on the Number of *Ex Parte* Contacts that are Being Withheld Because They are Not Subject to the Tariff Act (January 25, 2005) at 2 (Department has provided information on " *all* [ex parte] meetings and contacts identified in the notes of agency employees").

The ultimate dispute between the parties with respect to the 50 sets of meeting notes is therefore quite narrow: Are the meetings in question covered by the Tariff Act's public record requirement for ex parte meetings? The Department argues (and the District Court agreed) that the meetings are not covered because the Tariff Act's public record requirement applies only to meetings between (i) outside "interested parties" and (ii) Department "decision [**27] makers." The problem for the Department is that its interpretation is inconsistent with the plain language of the statute, which provides:

> The administering authority and the Commission shall maintain a record of any ex parte meeting between-
>
> (A) interested parties or other persons providing factual information in connection with a proceeding, and
>
> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,
>
> if information relating to that proceeding was presented or discussed at

> such meeting. The record of such an ex [*323] parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted.

19 U.S.C. § 1677f(a)(3). As this statutory language makes clear (and contrary to the Department's argument), the public record requirement for ex parte meetings is *not* limited to meetings between outside interested parties and Department "decision makers." Rather, the requirement applies to meetings between: (i) interested parties or [**28] other persons providing factual information in connection with a proceeding, and (ii) the person charged with making the determination, or any person charged with making a final recommendation to that person.

In assessing the 50 sets of meeting notes, the District Court did not apply the definition in the statutory text; it instead accepted the narrower definition advanced by the Department. We therefore must reverse and remand for further proceedings with respect to the 50 sets of meeting notes. On remand, the District Court first should determine which of the meetings reflected in the 50 sets of notes are covered ex parte meetings under the statutory definition. In that regard, we point out that although the Department's interpretation of the statute is too narrow, Baker Hostetler's interpretation of the statute is too broad. Baker Hostetler argues that the Act "requires Commerce to disclose *ex parte* meetings with *staff*," Baker Hostetler's Br. at 38 (emphasis added), regardless whether the staff member meets the statutory definition of "the person charged with making the determination, or any person charged with making a final recommendation to that person," *19 U.S.C. § 1677f(a)(3)(B)* [**29] . Baker Hostetler's interpretation is overinclusive. On remand, the District Court should adhere to the plain terms of the statutory language in determining which meetings are covered.

For any meeting that the District Court finds to be covered by the public record requirement, the court then should determine which parts of the notes from those meetings must be disclosed. As it has done throughout this litigation with respect to other notes, the District Court should order the Department to disclose only those portions of the notes from covered meetings that reflect the identity of persons present or the date, time, or place of the meeting. *Cf. 5 U.S.C. § 552(b)* (agency must disclose "reasonably segregable" portions of a requested record "after deletion of the portions which are exempt"); *Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980)* ("[FOIA] does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.").

The Tariff Act's public record requirement also directs the Department to prepare a "summary [**30] of the matters discussed" during a covered meeting. *19 U.S.C. § 1677f(a)(3)*. Of course, the Department is not required to create such records in this FOIA suit. *See Kissinger, 445 U.S. at 152*. And it is not at all clear whether any portion of meeting notes would qualify as a "summary of the matters discussed" as contemplated by the Tariff Act. Throughout this litigation, so as to avoid any delay as a result of this question, the Department has agreed to disclose "the topics discussed" at covered meetings. *See* Department's Br. at 17 (noting that the Department "has provided such information as . . . the topics discussed during contacts on the AD/CVD proceedings"); J.A. 306-328, 312 (Department's Second Amended *Vaughn* Index, summarizing "contacts with outside [*324] persons, whether under the Tariff Act or not, and the topics discussed"). The parties have not suggested that the District Court follow a different practice on remand with respect to any additional covered meetings, and the District Court may continue to take that same approach.

3. One set of meeting notes raises a different issue. Those are the notes taken by Department of Commerce [**31] official Bernard Carreau during his telephone conversation with a trade association representing U.S. lumber companies. The public record requirement covers meetings in which a person provides a Department official "factual information *in connection with a proceeding*." *19 U.S.C. § 1677f(a)(3)(A)* (emphasis added). Based on its in camera review, the District Court found that these notes did not concern the antidumping/countervailing duty proceeding. Because we have no reason to question that factual description, we conclude that the notes of the telephone call were not covered by the public record requirement. We therefore affirm the District Court's decision that the notes of the Carreau meeting were properly withheld under FOIA Exemption 5.

V

Like many other federal statutes, the Freedom of Information Act provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." *5 U.S.C. § 552(a)(4)(E)*. After Baker Hostetler filed suit in this case, the Department produced (in full [**32] or redacted form) numerous responsive documents in accordance with the District Court's orders. As a result, Baker Hostetler contends it is a "complain-

ant" that has "substantially prevailed" in the FOIA litigation (and therefore may receive attorney's fees). The District Court ruled, however, that Baker Hostetler is not eligible for attorney's fees because the firm represented itself in the litigation.

We conclude that Baker Hostetler is eligible for attorney's fees because of (i) the plain text of the statute and (ii) the Supreme Court's decision in *Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)*, particularly footnote 7 of that opinion. We note, moreover, that the two other Court of Appeals panels to consider the issue after *Kay* each unanimously concluded that a law firm representing itself is eligible for attorney's fees.

By its terms, FOIA's fees provision applies to all "complainants" who have "substantially prevailed." The statutory text contains no exception for a law firm that represents itself. In interpreting attorney's fees provisions, as in construing other statutes, courts must adhere to the plain text. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459, 165 L. Ed. 2d 526 (2006)*; [**33] *Lamie v. U.S. Tr., 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)*; *W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991)*; *Zerilli v. Evening News Ass'n, 202 U.S. App. D.C. 217, 628 F.2d 217, 220 (D.C. Cir. 1980)*. Under the plain language of *§ 552(a)(4)(E)*, Baker Hostetler is a "complainant" and may receive attorney's fees if it substantially prevailed.

The Department correctly points out, however, that the Supreme Court and this Court have carved out a narrow exception to attorney's fee statutes when *individual* plaintiffs represent themselves. *See, e.g., Kay, 499 U.S. at 437-38*; *Burka v. United States HHS, 330 U.S. App. D.C. 59, 142 F.3d 1286 (D.C. Cir. 1998)*. In *Kay*, the Supreme Court held that an individual attorney representing himself could not recover [*325] attorney's fees under *42 U.S.C. § 1988*, the attorney's fees provision for certain civil rights suits. *499 U.S. at 437-38*. The Court reasoned that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate [**34] for an award under *§ 1988*." *Id. at 435-36* (footnote omitted). The attorney's fees provision was designed, moreover, to "enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Id. at 436*. Congress wanted to "ensur[e] the effective prosecution of meritorious claims," which is more likely when litigation decisions are informed by "the judgment of an independent third party." *Id. at 437*.

In *Kay*, the Supreme Court made crystal clear, however, that the exception for *individual* plaintiffs who represent themselves does not apply to *organizations*:

> Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship.

Id. at 436 n.7. In explaining that organizations [**35] may recover fees when represented by in-house counsel, the Supreme Court did not distinguish between law firms and other types of organizations. Nor can we see any principled basis for making such a distinction. Footnote 7 suggests that an in-house counsel for a corporation is sufficiently independent to ensure effective prosecution of claims, thus justifying fees. An attorney who works for a law firm certainly is no less independent than an attorney who works for a corporation. Therefore, it would make little sense to slice and dice *Kay*'s conclusion regarding "organizations" and apply footnote 7 to *some* organizations but not others.

This Court relied on *Kay* in holding that individual plaintiffs representing themselves could not obtain attorney's fees under FOIA. *Burka, 142 F.3d at 1288-92*. Because the *Burka* case involved an individual plaintiff, we had no occasion to address footnote 7 of *Kay* and the Supreme Court's distinction between individual and organizational litigants.

Since *Kay*, two Courts of Appeals-the Fourth Circuit and the Fifth Circuit-have considered the application of attorney's fees statutes to law firms that represent themselves. [**36] Both courts persuasively relied on footnote 7 of *Kay* in holding that law firms are eligible for fees in such cases. In *Bond v. Blum*, two law firms that represented themselves in a copyright case sought attorney's fees under *17 U.S.C. § 505. 317 F.3d 385, 398 (4th Cir. 2003)*. Relying on footnote 7 of *Kay*, the Court of Appeals concluded that the rule against individual attorney-litigants recovering fees does not apply "in circumstances where *entities* represent themselves through in-house or *pro bono* counsel." *Id. at 399* (emphasis added). An attorney-client relationship exists, the court reasoned, when "a member of an entity who is also an attorney represents the entity." *Id. at 400*. Although such a member is "interested in the affairs of the entity, he would not be so emotionally involved in the issues of the case so as to distort the rationality and competence that

comes from independent representation." *Id.* The law firm "still remains a business [*326] and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the [**37] agency relationship inherent in the attorney-client relationship." *Id.* The Fifth Circuit similarly relied on footnote 7 of *Kay* and reached the same conclusion. *See Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Mfg. Corp., 236 F.3d 214, 218-19 (5th Cir. 2000)* (holding that law firm that represented itself could recovery attorney's fees under state statute in diversity case). As a result of our decision today, the three Courts of Appeals that have considered the question have all concluded that a law firm representing itself in litigation may receive attorney's fees.

To sum up on the fees issue: There are policy arguments for and against statutes that award attorney's fees to prevailing parties (the English rule), as well as statutes with one-way fee-shifting provisions such as the FOIA fees provision. Our task, however, is to interpret the statute as passed by Congress and construed by the Supreme Court. Baker Hostetler is a "complainant" eligible for fees under the plain text of the FOIA fees provision. The Supreme Court has made clear, moreover, that the exception to fees statutes for *individual* litigants who represent themselves does not extend [**38] to *organizational* litigants such as Baker Hostetler. Two Courts of Appeals have applied this Supreme Court precedent and held that a law firm that represents itself remains eligible for attorney's fees. We agree with those Courts of Appeals. We reverse and remand on the attorney's fees issue so that the District Court can determine whether Baker Hostetler "substantially prevailed" for purposes of the FOIA attorney's fees statute and is entitled to fees.

VI

We affirm the District Court's judgment with respect to the adequacy of the search, the 17 third-party letters exempt from disclosure under *5 U.S.C. § 552(b)(4)*, and the Carreau notes. We reverse and remand for further proceedings with respect to the 50 sets of meeting notes withheld under *5 U.S.C. § 552(b)(5)* and the attorney's fees determination.

So ordered.

DISSENT BY: KAREN LECRAFT HENDERSON

DISSENT

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting in part:

While I fully concur in Parts I-IV of the majority opinion, I disagree with the majority's conclusion that the United States Supreme Court's footnote observation in *Kay v. Ehrler, 499 U.S. 432, 436 n.7, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991),* [**39] can-or should-be stretched to permit a law firm litigant acting through its member lawyers to collect attorney's fees under FOIA's fee-shifting provisions.

In *Kay*, the Supreme Court extended the general principle that a *pro se* litigant is not entitled to attorney's fees under a similar fee-shifting provision to include a lawyer-litigant appearing *pro se. See 499 U.S. at 437-38.* The Court determined that the overriding purpose of the fee-shifting provision of *42 U.S.C. § 1988* is to ensure the retention of "independent counsel" and a bona fide attorney-client relationship capable of promoting "effective prosecution of meritorious claims." *Id. at 437.* That purpose applies equally to a lawyer proceeding *pro se* as to a layman. *Id.* As the Court noted, "[e]ven a skilled lawyer who represents himself is at a disadvantage in contested litigation" because "[h]e is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, [*327] and in making sure that reason, rather [**40] than emotion, dictates the proper tactical response to unforseen developments." *Id.* Further, "[e]thical considerations may make it inappropriate for [a lawyer proceeding *pro se*] to appear as a witness." *Id.*

Although *Kay* decided only the attorney's fee issue for a *pro se* lawyer-litigant, in a footnote the Court rejected the plaintiff's attempt to analogize his situation to the "organizations [Congress intended] to receive an attorney's fee even when they represented themselves" by noting that "an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship." *Id. at 436 n.7.* The Court said nothing to indicate what type of "organization" it meant except to describe its legal representative as either in-house or unpaid. *Id.* This type of legal representation does not immediately bring to mind a law firm "organization," at least not the Court's specification of a *pro bono* lawyer. [1] And even the "in-house counsel" referenced in footnote 7 means either corporate counsel or public sector lawyers [**41] employed in state attorney's offices more naturally than it does members of a law firm. *See, e.g., Wisconsin v. Hotline Indus., Inc., 236 F.3d 363 (7th Cir. 2000)* (State's attorney awarded attorney's fees for representing State under removal statute (*28 U.S.C. § 1447(c)*)).

1 An organization represented by "*pro bono* counsel," at least in my experience, refers to a public interest or other non-profit organization, not a law firm.

Nevertheless, using this "slim reed" dictum and disregarding the reasoning underlying the *Kay* holding, the majority construes the generic "organization" of *Kay*'s footnote 7 to include a law firm. Maj. Op. at 21-22. [2] Indeed, the majority goes further than the Supreme Court's description of an "organization" by concluding that "[a]n attorney-client relationship exists . . . when 'a member of an *entity* who is also an attorney represents the entity.'" Maj. Op. at 22 (quoting *Bond v. Blum, 317 F.3d 385, 400 (4th Cir. 2003))* [**42] (emphasis added). Because "[t]he law firm 'still remains a business and professional entity *distinct* from its members, . . . the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship.'" *Id.* at 23 (quoting *Blum, 317 F.3d at 400*) (emphasis added).

2 The majority relies on the post-*Kay* decisions of two other courts of appeals. *See Bond v. Blum, 317 F.3d 385, 398 (4th Cir. 2003)*; *Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Mfg. Corp., 236 F.3d 214, 218-19 (5th Cir. 2000)*. Although both circuits concluded that a law firm constitutes an organization within the meaning of *Kay*'s footnote 7, each proceeded more tentatively than the majority suggests. *See* Maj. Op. at 22-23. In *Blum* the Fourth Circuit recognized that "representation of a law firm by one of its members presents an increased risk of emotional involvement and loss of independence" but awarded attorney's fees because the record gave "no indication" of compromised independence. *317 F.3d at 400*. The Fifth Circuit's invocation of *Kay* in *Metal Sales Mfg.* was even more conditional. The case involved a Louisiana statute under which the Louisiana state courts had in the past permitted attorney's fees awards to lawyers proceeding *pro se*. *See 236 F.3d at 218*; *Hoskins v. Ziegler, 506 So. 2d 146 (La. Ct. App. 1987)*. The Fifth Circuit noted *Kay*'s applicability only "if the Louisiana Open Account Statute were construed to require both a lawyer and a client." *Id. at 219*.

[**43] The majority's reasoning thus reduces to the following: (1) a law firm constitutes an entity with a legal identity distinct from its members; (2) an entity with a separate [*328] identity comes within the minimal description of "organizations . . . represent[ing] themselves" in *Kay*'s footnote dictum, *see Kay, 499 U.S. at 436 n.7*; and, therefore, (3) a law firm constitutes an organization eligible for attorney's fees even when it is represented by its members. Yet *Kay*'s observation regarding "organizations" is not based simply on the distinction between an entity and an individual. Instead, *Kay*'s emphasis on independent judgment and ethical considerations in holding lawyer-litigants barred from attorney's fees is wholly ignored by the majority. [3]

3 Moreover, the majority fails to consider the implications of basing its reasoning on the separate identities of law firms as entities and its member lawyers as individuals. Under the majority's reading of *Kay* need an individual lawyer simply incorporate himself in order to be eligible for attorney's fees? And what of the sole practitioner with a "firm" identity formally separate from himself as an individual? In addition, the majority fails to address an inconsistency in its reliance on *Kay*: At the same time it splits the law firm entity from its members, it does so relying on the Supreme Court's description of organizations "represent[ing] *themselves*." *Kay, 499 U.S. at 436 n.7* (emphasis added).

[**44] Not only does the majority stretch *Kay*'s dictum past its breaking point but, in my view, it strays from our own precedent. In *Burka v. United States HHS, 330 U.S. App. D.C. 59, 142 F.3d 1286 (D.C. Cir. 1998)*, we interpreted *Kay*, stressing the necessity of independent legal judgment, to deny attorney's fees not only to the lawyer-litigant but also to his law firm colleagues for their legal services rendered in a FOIA action. *See 142 F.3d at 1291-92*. Acknowledging an earlier case awarding fees to a lawyer-litigant for the work of co-counsel, *see Lawrence v. Bowsher, 289 U.S. App. D.C. 346, 931 F.2d 1579 (D.C. Cir. 1991)*, we distinguished it based on the fact that co-counsel there were not "affiliated with the litigant's law practice." *Burka, 142 F.3d at 1291*. With no affiliation, as in *Lawrence*, we found the "independent counsel" that *Kay* emphasized. *Id.*; *see also Lawrence, 931 F.2d at 1579*. Relying on *Kay*, we then noted that the agency relationship which "'the word attorney assumes' . . . does not exist . . . where the counsel are simply colleagues at the litigant's law firm working [**45] under the litigant's direction." *Burka, 142 F.3d at 1291* (quoting *Kay, 499 U.S. at 435*). Thus, because the lawyer-litigant controlled legal strategy and the presentation of evidence and co-counsel were not "independent counsel *hired* by him to assist him," no genuine attorney-client relationship existed and attorney's fees were unavailable. *Id.* (emphasis added).

In practice, there is no difference between Burka's co-counsel working for, and under the direction of, their law firm colleague and Baker & Hostetler's members' representation of *all* of their affiliated partners, that is, the law firm itself. *Burka*'s denial of fees for the work of

co-counsel working "in the same firm" as the individual lawyer-litigant applies equally to lawyers who constitute "the same firm." *See id. at 1292*. Just as Burka directed his affiliated co-counsel, Baker & Hostetler controlled and directed its quest for attorney's fees through its member lawyers, presumably acting as "the final filter," *Kooritzky v. Herman, 336 U.S. App. D.C. 268, 178 F.3d 1315, 1324 (D.C. Cir. 1999)*, for litigation decisions.

Absent the "detached perspective" [**46] that comes from independent counsel, a law firm as an entity--as much as a lawyer-litigant--may have an interest in bringing suit if a fee-shifting statute is in effect "solely as a way to generate fees rather than to vindicate personal claims." *Falcone v. IRS, 714 F.2d 646, 648 (6th Cir. 1983)* ("We do not believe that Congress intended to so subsidize attorneys without [*329] clients."). [4] Moreover, in light of *Kay*'s focus upon independent legal judgment, a "rule that authorizes awards of counsel fees to *pro se* litigants . . . who are members of the bar-would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf." *Kay, 499 U.S. at 438*; *cf. Blum, 317 F.3d at 400*. Finally, it is possible, if not likely, that the firm members representing Baker & Hostetler in the FOIA action may be witnesses in seeking attorney's fees, thereby implicating the ethical concerns voiced in *Kay*. *See 499 U.S. at 437*.

4 While the Court in *Kay* did not use *Falcone*'s interest analysis, the Court described *Falcone* as requiring the same "detached and objective perspective" that it found lacking in *Kay*. *Compare Kay, 499 U.S. at 434 n.4* (quoting *Falcone, 714 F.2d at 647*) *with id. at 437*.

[**47] The Supreme Court recently reaffirmed, in a different context, the decision of a sister circuit "to err on the side of caution" when facing "imprecision in [the Court's] prior cases" by "neither forc[ing] . . . nor bur[ying] the issue" but instead by "follow[ing] [the Court's precise holding] until expressly overruled by the Supreme Court," even if the holding has since been undermined by intervening precedent. *Eberhart v. United States, 546 U.S. 12, 126 S. Ct. 403, 404, 407, 163 L. Ed. 2d 14 (2005)* (noting tension between Court's earlier holding that filing deadlines are "jurisdictional" and intervening precedent finding other time prescriptions non-jurisdictional). Such caution is even more apt here. *See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002)* (declining "to turn dictum into holding"); *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp., 513 U.S. 18, 24, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994)* ("invoking our customary refusal to be bound by dicta"). Rather than relying on *Kay*'s footnote dictum to "force" a holding that a law firm litigant is eligible for attorney's fees under FOIA based on its members' work, [**48] I would follow Circuit precedent--as well as the *holding* in *Kay*--and find Baker & Hostetler ineligible for attorney's fees under FOIA. Accordingly, I respectfully dissent from Part V of the majority opinion.

000017

Richard Arsenault

From: Olcott, Bruce A. [BOlcott@ssd.com]
Sent: Wednesday, August 06, 2008 12:55 PM
To: Richard Arsenault
Subject: Progeny FOIA Matter
Attachments: Bartholdi Cable v. FCC.doc

Attached is the case that I mentioned.
Thanks,
Bruce

<<Bartholdi Cable v. FCC.doc>>

10033Z

Time of Request: Tuesday, August 05, 2008 19:24:19 EST
Client ID/Project Name: 99006100888
Number of Lines: 309
Job Number: 2822:107005706

Research Information

Service: LEXSEE(R) Feature
Print Request: Current Document: 1
Source: Get by LEXSEE(R)
Search Terms: 114 F.3d 274, 281

Note: Exemption 4 FOIA

Send to: GUYAN, JOSHUA-09930
SQUIRE SANDERS & DEMPSEY LLP
1201 PENNSYLVANIA AVE NW STE 500
WASHINGTON, DC 20004-2491

LEXSEE 114 F.3D 274, 281

BARTHOLDI CABLE COMPANY, INC., PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS; TIME WARNER CABLE OF NEW YORK CITY AND PARAGON COMMUNICATIONS, INTERVENORS

No. 96-1030, Consolidated with No. 96-1094

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

324 U.S. App. D.C. 420; 114 F.3d 274; 1997 U.S. App. LEXIS 12794

May 9, 1997, Argued
June 3, 1997, Decided

PRIOR HISTORY: [**1] Petitions for Review of an Order of the Federal Communications Commission.

DISPOSITION: Bartholdi's challenges to the Commission's order are without merit. Its petition for review is therefore denied. We also dismiss Time Warner's petition for lack of jurisdiction.

COUNSEL: Clifford M. Sloan argued the cause for petitioner Bartholdi Cable Company, Inc., with whom Robert L. Pettit and Robert L. Begleiter were on the briefs. Larry S. Solomon entered an appearance. R. Bruce Beckner argued the cause for petitioner Time Warner Cable of New York City and Paragon Communications, with whom Arthur H. Harding and Jill Kleppe McClelland were on the briefs.

Joel Marcus, Counsel, Federal Communications Commission, argued the cause for respondent, with whom William E. Kennard, General Counsel, and Daniel M. Armstrong, Associate General Counsel, were on the brief. Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, United States Department of Justice, entered appearances.

Clifford M. Sloan argued the cause for Bartholdi Cable Company, Inc., as intervenor, with whom Robert L. Pettit and Robert L. Begleiter were on the brief. Larry S. Solomon entered an appearance. Arthur H. Harding, R. Bruce Beckner, [**2] and Jill Kleppe McClelland filed a brief for Time Warner Cable of New York City and Paragon Communications as intervenors.

JUDGES: Before: SILBERMAN, SENTELLE and GARLAND, Circuit Judges. Opinion for the Court filed by Circuit Judge SENTELLE.

OPINION BY: SENTELLE

OPINION

[*277] SENTELLE, *Circuit Judge*: Bartholdi Cable Co. ("Bartholdi") and Time Warner Cable of New York City ("Time Warner") petition for review of a Federal Communications Commission ("FCC" or "Commission") order rejecting Bartholdi's claim that material it submitted to the Commission was protected from public disclosure by the attorney-client and work-product privileges as well as Exemptions 4 and 6 of the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*. For the reasons discussed below, we deny Bartholdi's petition for review and dismiss Time Warner's petition for lack of jurisdiction.

I. Background

In 1991, the FCC authorized the licensing of radio frequencies known as operational fixed microwave service ("OFS") for the distribution of video programming to the public. Since that time, Bartholdi (formerly known as Liberty Cable Co., Inc.) has used OFS "paths" to provide multi-channel video programming to approximately 30,000 [**3] subscribers in apartment buildings in the New York metropolitan area.

[*278] In order for Bartholdi to provide its service lawfully, it must first obtain from the Commission an OFS license for each microwave path between a radio station and a receiver located on the roof of the building that contracted to receive Bartholdi service. In order to expedite provision of service to subscribers, Bartholdi

has applied for and the Commission has granted Special Temporary Authority pursuant to *47 U.S.C. § 309(f)* and *47 C.F.R. § 101.31*, allowing Bartholdi to provide service pending license approval.

In March 1995, Bartholdi applied to the FCC for a number of OFS licenses. Time Warner, a competitor of Bartholdi, petitioned to deny the applications. On May 5, 1995, in one of its petitions to deny Bartholdi's OFS license applications, Time Warner informed the Commission of its discovery that Bartholdi had begun using two OFS paths without licenses.

In the meantime, Bartholdi purportedly discovered that it had begun providing service to some buildings in New York without prior authorization from the Commission. Bartholdi admitted premature activation of service to the two buildings identified by Time [**4] Warner and "immediately" began investigating the cause of the premature activations. Bartholdi also disclosed to the Commission the existence of thirteen other prematurely activated buildings. As a result of these revelations, Bartholdi's chairman retained outside counsel to determine the cause of the premature activations and to institute a compliance program.

Outside counsel conducted an "exhaustive" investigation of Bartholdi's company records and interviewed all persons with relevant knowledge. Outside counsel then prepared a comprehensive report. The report contains a description of Bartholdi's internal business and licensing operations, information concerning Bartholdi's customers, the history of management breakdown that led to the premature activations, and the identity, functions, and performance evaluations of various Bartholdi personnel.

In light of Bartholdi's disclosed violations, the Chief of the FCC's Microwave Branch sent a letter to Bartholdi on June 9, 1995, requesting that Bartholdi provide additional information concerning its unlicensed operations. In response to this request, Bartholdi submitted, *inter alia,* a chart showing the addresses, dates of commencement [**5] of service, and number of subscribers at each of the fifteen buildings that received unauthorized service. On the same day, Bartholdi's president informed the Wireless Telecommunications Bureau ("WTB") that "[a] complete investigation of this administrative foul-up is currently being conducted by outside counsel." Shortly thereafter, Bartholdi revealed an additional four instances of unlicensed service, bringing the total number to nineteen.

After that revelation, the Chief of the Enforcement Division of the WTB directed Bartholdi "to submit to the Commission the results of its recently conducted internal audit." Specifically, Bartholdi's report to the Commission was to list (1) "*all* of the OFS paths which [Bartholdi] has constructed and/or operated without authority," (2) "which of these unauthorized paths were not disclosed to the Commission in response to its letter of June [9], 1995," (3) "the date each unauthorized path was constructed and placed in operation," (4) "the number of subscribers currently being served by each new path," and (5) "whether [Bartholdi] is charging subscribers for service received via these unauthorized paths."

Several days later Bartholdi [**6] responded to the WTB's request by submitting a letter summarizing the findings of Bartholdi's outside counsel; a detailed list of unauthorized operations, number of subscribers, commencement dates, and charged subscribers; and the full text of the outside counsel's report as well as certain documents and communications attached to the report. These submissions were accompanied by a request that they remain confidential under Exemptions 4 and 6 of FOIA. Alternatively, to the extent the WTB determined that the submissions should not remain confidential, Bartholdi requested that the submissions be returned without consideration pursuant to *47 C.F.R. § 0.459(e)*. Bartholdi's request for confidentiality also made passing reference to the attorney-client and work-product privileges.

[*279] On September 13, 1995, the WTB denied Bartholdi's request for confidentiality and ordered that Bartholdi disclose the submitted materials to Time Warner and the general public. Bartholdi filed an application for review with the Commission on September 20, 1995, seeking reversal of the WTB's ruling. The application for review contained extensive discussion of Bartholdi's claims for confidentiality under Exemptions [**7] 4 and 6 of FOIA. However, the application contained no discussion of the attorney-client or work-product privileges, nor did it make mention of *47 C.F.R. § 0.459(e)*.

The Commission denied Bartholdi's application for review and "affirmed the WTB's ruling in all ... respects." *Liberty Cable Co., Inc., 11 F.C.C.R. 2475, at 2475 (1996)*. The Commission rejected Bartholdi's Exemption 4 confidentiality claim on the ground that Bartholdi failed to establish that disclosure of the information submitted to the Commission would result in "competitive harm." *Id. at 2476*. Alternatively, the Commission rejected the Exemption 4 claim on the ground that "public interest considerations favoring openness in ... licensing proceedings ... outweigh any need to protect the audit report from disclosure." *Id. at 2477*. Similarly, the Commission rejected Bartholdi's Exemption 6 claim on the ground that "significant public policy considerations warrant disclosure." *Id.* As for Bartholdi's privilege claims, the Commission noted that Bartholdi's application for review "does not even mention, let alone discuss, these privileges." *Id.* In any event, the Commission rejected the privilege claims [**8] on the ground that Bar-

tholdi had failed "to provide any specific information or explanation to substantiate its generalized claims of privilege." *Id.* Bartholdi then sought and obtained an emergency stay from this court. This petition for review followed.

II. Analysis

Bartholdi maintains that the Commission's decision was arbitrary and capricious. *5 U.S.C. § 706(2)(A)*. Under the arbitrary and capricious standard of review, we do not "substitute [our] judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)*. Rather, we look only to see whether the agency action reflects a " 'clear error in judgment.' " *Bell Atl. Tel. Cos. v. FCC, 316 U.S. App. D.C. 395, 79 F.3d 1195, 1202 (D.C. Cir. 1996)* (quoting *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971))*.

A. Attorney-client and Work-product Privileges.

Bartholdi first contends that the Commission's rejection of the privilege claims does not reflect reasoned decisionmaking. We need not reach that issue as we conclude that Bartholdi's claims of privilege were not properly raised before the Commission. *Section 405* of the Communications [**9] Act provides that the Commission must be afforded an "opportunity to pass" on an issue as a condition precedent to judicial review. *47 U.S.C. § 405(a)(2)*. In this case, Bartholdi raised its privilege claims, if at all, only before the WTB. Bartholdi's application for review to the Commission made no mention of either the attorney-client or work-product privilege. Under the plain language of *Section 405*, an issue cannot be preserved for judicial review simply by raising it before a Bureau of the FCC. It is "the Commission" itself that must be afforded the opportunity to pass on the issue. Id.; *cf. Parsippany Hotel Management Co. v. NLRB, 321 U.S. App. D.C. 274, 99 F.3d 413, 418 (D.C. Cir. 1996)* (holding that issue raised before ALJ, but not NLRB, was not preserved).

Bartholdi contends that it preserved the privilege claims by attaching an affidavit discussing the issue to its application for review filed with the Commission. In a similar vein, Bartholdi claims that a footnote in its application for review incorporating all claims made before the WTB was sufficient to preserve the issue for our review. We reject each of these arguments. The Commission "need not sift pleadings and documents to identify" [**10] arguments that are not "stated with clarity" by a petitioner. *See WAIT Radio v. FCC, 135 U.S. App. D.C. 317, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027, 34 L. Ed. 2d 321, 93 S. Ct. 461 (1972)*. It is the [*280] petitioner that has the "burden of clarifying its position" before the agency. *Northside Sanitary Landfill, Inc. v. Thomas, 270 U.S. App. D.C. 387, 849 F.2d 1516, 1519 (D.C. Cir. 1988), cert. denied, 489 U.S. 1078, 103 L. Ed. 2d 833, 109 S. Ct. 1528 (1989)*. In this case, Bartholdi failed to carry that burden. Bartholdi "should have assumed at least a modicum of responsibility for flagging the relevant issues which its documentary submissions presented." *Id.; see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978)*. By failing to do so, Bartholdi waived its privilege claims. Bartholdi, however, argues that even if it failed to raise the privilege claims before the Commission, the claims are properly before us because they were actually addressed by the Commission. We disagree. The mere fact that the Commission discusses an issue does not mean that it was provided a meaningful "opportunity to pass" on the issue. It is only through the adversarial process (or analogous circumstances) that the Commission is afforded such an opportunity within [**11] the meaning of *§ 405*.

We, of course, recognize that *§ 405* does not require that the party seeking judicial review of an issue be the party that provided the Commission with the opportunity to pass on the issue. As a result, we have considered issues that were addressed by the Commission after being presented by someone other than the petitioner. *E.g., Office of Communication of the United Church of Christ v. FCC, 250 U.S. App. D.C. 312, 779 F.2d 702, 707 (D.C. Cir. 1983)* (considering issue raised before the Commission by another party); *Office of Communication of the United Church of Christ v. FCC, 150 U.S. App. D.C. 339, 465 F.2d 519, 523-24 (D.C. Cir. 1972)* (considering issue raised by dissenting commissioners). But petitioner cites no case in which we held that the mere fact that the Commission addressed an issue was sufficient to preserve the issue for judicial review. Indeed, we have rejected such arguments in analogous contexts. *Cf. Local 900 Int'l Union of Elec., Radio and Mach. Workers v. NLRB, 234 U.S. App. D.C. 85, 727 F.2d 1184, 1191 (D.C. Cir. 1984)* (holding that discussion of an issue by the NLRB did not necessarily prove compliance with § 10(e) of the NLRA requiring that issues be raised before the Board in order to obtain [**12] judicial review of such); *Parsippany Hotel, 99 F.3d at 418* (holding that discussion of an issue in an ALJ opinion adopted by the Board was "insufficient to satisfy the requirements" of § 10(e) of the NLRA); *Burkhart v. WMATA, 112 F.3d 1207, 1997 U.S. App. LEXIS 11371*, slip op. at 15 (D.C. Cir. 1997) (holding that district court's discussion of an alternative ground for its decision did not undermine its ruling that appellant's claim was untimely raised). [1]

1 Petitioner cites our opinion in *Washington Ass'n for Children & Television, 229 U.S. App. D.C. 363, 712 F.2d 677, 682 & n.10 (D.C. Cir.*

1983), where we stated that "it is not always necessary for a party to raise an issue, so long as the Commission in fact considered the issue." But that statement was at most dicta. Moreover, none of the cases cited in support of that statement involved the consideration of an issue by this or any other circuit in an adjudicatory proceeding when the issue was not presented to the Commission.

In any event, Bartholdi's challenge to the Commission's ruling [**13] on the privilege claims must fail. The Commission rejected Bartholdi's claims of privilege on the ground that they were not "substantiated." *11 F.C.C.R. at 2477.* We have repeatedly held that the party claiming a privilege has the burden of "presenting to the court sufficient facts to establish the privilege." *In re Sealed Case, 237 U.S. App. D.C. 312, 737 F.2d 94, 99 (D.C. Cir. 1984).* Bartholdi's application for review filed with the Commission made no mention of the attorney-client or work-product privileges, much less attempted to establish the existence of such. Under these circumstances, we cannot find the Commission's rejection of the privilege claims to be arbitrary or capricious.

B. FOIA.

Bartholdi further argues that its submissions to the Commission are protected from disclosure by FOIA. FOIA "requires agencies to comply with requests to make their records available to the public, unless the requested records fit within one or more of nine categories of exempt material." *Oglesby v. United States Dep't of the Army, 316 U.S. App. D.C. 372, 79 F.3d 1172, 1176* (D.C.

Cir. 1996); *5 U.S.C.* [*281] *§ 552.* Bartholdi contends that its submissions fall within FOIA Exemptions 4 and 6.

1. Exemption 4.

Exemption 4 of FOIA [**14] provides that an agency need not disclose information that is "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *5 U.S.C. § 552(b)(4).* The test for whether information is "confidential" depends in part on whether the information was voluntarily or involuntarily disclosed to the government. If the information was voluntarily disclosed to the government, it will be considered confidential "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC, 298 U.S. App. D.C. 8, 975 F.2d 871, 879 (D.C. Cir. 1992)* (en banc), *cert. denied, 507 U.S. 984, 123 L. Ed. 2d 147, 113 S. Ct. 1579 (1993).* If the information was obtained under compulsion, it will be considered confidential only "if disclosure ... is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765, 770 (D.C. Cir. 1974).*

Of course, the mere fact that information falls within a [**15] FOIA exemption does not of itself bar an agency from disclosing the information. *Chrysler Corp. v. Brown, 441 U.S. 281, 293, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979).* But we have held that information falling within Exemption 4 of FOIA also comes within the Trade Secrets Act, *18 U.S.C. § 1905*, which prohibits the disclosure of, *inter alia*, "trade secrets" and "confidential statistical data." *CNA Fin. Corp. v. Donovan, 265 U.S. App. D.C. 248, 830 F.2d 1132, 1151 (D.C. Cir. 1987)* (holding that "the scope of the [Trade Secrets] Act is at least co-extensive with that of Exemption 4 of FOIA"), *cert. denied, 485 U.S. 977, 99 L. Ed. 2d 481, 108 S. Ct. 1270 (1988).* Thus, generally when "a party succeeds in demonstrating that its materials fall within Exemption 4, the government is precluded from releasing the information by virtue of the Trade Secrets Act." *McDonnell Douglas Corp. v. Widnall, 313 U.S. App. D.C. 77, 57 F.3d 1162, 1164 (D.C. Cir. 1995).* However, information otherwise protected by the Trade Secrets Act may be disclosed if "authorized by law." *See 18 U.S.C. § 1905.* The Supreme Court has held that the release of otherwise protected information to the public is "authorized by law" if permitted by a regulation that is: (1) "rooted in a grant of power by the Congress" [**16] to limit the scope of the Trade Secrets Act; (2) "substantive," rather than interpretive or procedural; and (3) consistent "with any procedural requirements imposed by Congress" such as the APA. *Chrysler, 441 U.S. at 302-03.*

Section 0.457 of the Commission's regulations permits disclosure of exempt materials to the extent "the policy considerations favoring non-disclosure" are outweighed by factors favoring disclosure. *47 C.F.R. § 0.457.* The Commission has held that this regulation is "authorized by law" as that phrase was defined by the Supreme Court in *Chrysler.* In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission: *Notice of Inquiry, 11 F.C.C.R. 12406 (1996).* Pursuant to § 0.457, the WTB ruled that "the public interest in disclosure of [Bartholdi's] materials would justify disclosure as a matter of our discretion even if the materials could be withheld under the FOIA." *See* Letter from Ralph A. Haller, Deputy Chief, WTB, to Henry M. Rivera et al., Counsel for Bartholdi 4 (Sept. 13, 1995). The Commission affirmed this conclusion in its order, holding that "public interest considerations favoring [**17] openness

in our licensing proceedings outweigh any potential difficulty that the Government might experience in obtaining access to information in similar circumstances." *11 F.C.C.R. at 2477.*

Bartholdi argues that § 0.457 of the Commission's regulations does not meet the definition of "authorized by law" under *Chrysler.* But Bartholdi did not raise this challenge before the Commission. Bartholdi's application for review made no mention of *Chrysler.* Because Bartholdi failed to challenge the validity of § 0.457 before the [*282] Commission, we decline to consider the issue. *47 U.S.C. § 405.*

Therefore, assuming the validity of § 0.457, we cannot conclude that the Commission acted arbitrarily in concluding that the public interest considerations in disclosure outweighed those in favor of confidentiality. As the Commission now explains, much of the information for which Bartholdi seeks confidential treatment is already publicly available. Moreover, the Commission concluded that the public has a compelling interest in the information at issue as it bears directly on Bartholdi's fitness as a license applicant. Bartholdi chastises the Commission for failing to articulate these rationales [**18] in its order. But a more explicit discussion in the Commission's order would have risked disclosure of the information Bartholdi was attempting to keep confidential. We cannot fault the Commission for attempting to maintain the confidentiality of Bartholdi's submissions pending judicial re- view.

2. Exemption 6.

Exemption 6 of FOIA permits the Government to withhold from public disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(6).* The Commission held that "the documents at issue are not medical files nor do we find them to be the type of records typically found in personnel files." *11 F.C.C.R. at 2477.* The Commission declined to determine whether Bartholdi's submissions constituted "similar files," because "even assuming a protectable privacy interest does exist," the Commission concluded "that significant public policy considerations warranted disclosure." *Id.* (footnote omitted).

Bartholdi does not challenge the Commission's conclusion that the submissions are not personnel or medical files. Rather, Bartholdi argues that the Commission improperly balanced [**19] the competing privacy and public interests at issue in deciding to release the submissions. In *United States Dep't of Defense v. FLRA,* the Supreme Court explained that to determine whether requested information falls within Exemption 6, " 'a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.' " *510 U.S. 487, 495, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994)* (quoting *Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989))* (alteration in original). "The only relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is "contributing significantly to public understanding *of the operations or activities of the government.*' " *Id.* (quoting *Reporters Comm., 489 U.S. at 775* (internal quotation marks omitted)) (alteration and emphasis in original). According to Bartholdi, the Commission's decision to allow public access to its submissions does not serve this core purpose of FOIA. We disagree.

Bartholdi's submissions consist of descriptions of Bartholdi's mismanagement of its employees. This information is clearly [**20] relevant to the public's understanding of the type of entities to which the government is distributing a valuable public asset, FCC licenses. On the other side of the scale, the Commission found only a "minor" privacy interest in protecting the identity of the individuals responsible for Bartholdi's violation given that these individuals have been identified in public documents filed with the Commission by Bartholdi. 11 F.C.C.R. at 2477. We cannot say that the Commission's balancing of these competing interests was arbitrary or capricious.

Moreover, even were Bartholdi correct that its submissions fall within Exemption 6, the Commission is not *required* to withhold the information from public disclosure. The fact that information falls within one of the FOIA exemptions does not necessarily mean that the agency cannot disclose the material. FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information from the public. *Chrysler Corp., 441 U.S. at 293.* Unlike information falling within Exemption 4, information falling within Exemption 6 is not [*283] necessarily protected from disclosure by the Trade Secrets Act.

C. 47 C.F.R. § 0.459(e).

[**21] Finally, Bartholdi contends that the Commission acted arbitrarily when it failed to return Bartholdi's submissions after rejecting its request for confidentiality. The Commission's regulations provide that when information is voluntarily submitted to the FCC, the Commission will "ordinarily" return the information "without consideration if the request for confidentiality should be denied." *47 C.F.R. § 0.459(e).* Even assuming, arguendo, that Bartholdi's submissions to the Commission were voluntary, we need not determine whether the Commission acted arbitrarily in failing to return Bartholdi's submissions. This claim was not raised in Bar-

tholdi's application for review to the Commission, and was thus waived. *47 U.S.C. § 405.*

D. Ex Parte Rules.

Time Warner also petitions for review of the Commission's order, arguing that the Commission arbitrarily concluded that Bartholdi had not violated the FCC's ex parte rules. Because a ruling in Time Warner's favor would alter the reasoning, but not the outcome of this case, we dismiss Time Warner's petition for lack of jurisdiction. *Radiofone, Inc. v. FCC, 245 U.S. App. D.C. 210, 759 F.2d 936, 940 (D.C. Cir. 1985)* (holding that "no standing exists [**22] to litigate an abstract dispute over the Commission's reasoning").

III. Conclusion

For the foregoing reasons, we conclude that Bartholdi's challenges to the Commission's order are without merit. Its petition for review is therefore denied. We also dismiss Time Warner's petition for lack of jurisdiction.

10033Z

********** Print Completed **********

Time of Request: Tuesday, August 05, 2008 19:24:19 EST

Print Number: 2822:107005706
Number of Lines: 309
Number of Pages:

Send To: GUYAN, JOSHUA-09930
SQUIRE SANDERS & DEMPSEY LLP
1201 PENNSYLVANIA AVE NW STE 500
WASHINGTON, DC 20004-2491

000026

Joel Taubenblatt

From: Amy Mehlman [amy@mehlmaninc.com]
Sent: Thursday, May 01, 2008 11:44 AM
To: Aaron Goldberger; Joel Taubenblatt
Subject: FW: Progeny Revised Extension Request
Attachments: Progeny LMS, LLC Request for Confidential Treatment and Attachment A.5.1.08.pdf; Progeny LMS, LLC WPQP845 Request for Waiver and Limited Extension of Time-First Deadline (As-Filed).5.1.08.pdf; Progeny LMS, LLC WPQP845 Request for Waiver and Limited Extension of Time-Second Deadline (As-Filed).5.1.08.pdf

FYI. Here is the new filing. We got rid of the original filing and refiled.

Talk to you soon,

Amy

Amy Mehlman
Mehlman Capitol Strategies, Inc.
1750 K Street, NW
Suite 350
Washington, DC 20006
202-457-1970
202-457-1971 (fax)
amy@mehlmaninc.com

NEXT DOCUMENT

EXHIBIT 7 FOLLOWS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request of Progeny LMS, LLC	)	
	)	File No. _____
For Waiver and Limited Extension of Time	)	
	)	
To: The Commission	)	

REQUEST FOR WAIVER AND LIMITED EXTENSION OF TIME

Bruce A. Olcott
Joshua T. Guyan
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6615

Its Attorneys

May 1, 2008

SUMMARY

Progeny LMS, LLC ("Progeny") herein requests a four-year extension of its current five-year construction deadline and a four-year extension of its ten-year construction deadline. Progeny will require a four-year extension of its current construction deadlines in order to design, develop and deploy its M-LMS network and meet the service requirements.

Progeny has been a proponent of M-LMS technology and services since the 1980s, holds the largest number of M-LMS licenses, and has actively participated in the Commission's open proceeding to revise the M-LMS rules. The Commission has previously recognized the public benefits in allowing the M-LMS equipment market to develop and generally recognizes that the public interest favors granting licensees extensions to deploy advanced technologies.

Progeny's five-year construction deadline was extended by three years in 2006 because no suitable M-LMS equipment was available. As recently as last year, the Commission recognized that no M-LMS licensees were providing service and that no viable M-LMS equipment is available in the United States. At that time, the Commission also granted second extensions of the five-year and ten-year construction deadlines to several other M-LMS licensees. Further, last month the Commission granted a four-year extension to Local Multipoint Distribution Service licensees due to the lack of viable and affordable equipment.

Currently, the necessary M-LMS equipment remains unavailable for deployment in the United States, despite Progeny's diligent efforts to pursue manufacture of such equipment. The difficulties with procuring such equipment recognized by the Commission remain unchanged as well—the development and rapid deployment of Global Positioning Satellite services including E-911 equipped mobile phones, the unique sharing requirements of the band, and the strict testing requirements imposed on M-LMS licensees. These impediments are beyond the control

of Progeny (and any other M-LMS licensee) and strict application of the construction deadlines would be inequitable and unduly burdensome under these circumstances.

At the same time, the unique sharing requirements of the 902 – 928 MHz band means that the band is currently used by numerous services and will remain so, even if M-LMS licensees require extensions of the construction deadlines. The spectrum is not lying fallow. The commission therefore does not risk under-utilization of the spectrum through the grant of a further extension request.

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request of Progeny LMS, LLC	)	
	)	File No. _____
For Waiver and Limited Extension of Time	)	
	)	
To: The Commission	)	

REQUEST FOR WAIVER AND LIMITED EXTENSION OF TIME

Progeny LMS, LLC ("Progeny"), by its attorneys, hereby submits this request for wavier pursuant to Section 1.925 of the Commissions Rules,[1] and limited extension of time pursuant to Section 1.946(e) of the Commission's Rules,[2] to meet the construction deadlines for its 900 MHz Multilateration Location and Monitoring Service ("M-LMS") Economic Area ("EA") licenses as required by Section 90.155(d) of the Commission's Rules ("Extension Request").

Progeny requests an additional four years to meet its five-year construction deadline and an additional four years to meet its ten-year construction deadline. As discussed herein, an extension of time is in the public interest, the necessary equipment to provide service is not available, and the spectrum will not lie fallow due to the unique sharing requirements of the band.

[1] *See* 47 C.F.R. § 1.925.

[2] *See* 47 C.F.R. § 1.946(e).

I. INTRODUCTION

Progeny successfully competed in Auction 21 in 1999, securing 226 B and C block licenses in 113 EAs and A block licenses in two additional EAs.[3] The original construction deadlines imposed pursuant to Section 90.155(d) of the Commission's Rules were July 19, 2005 for the five-year build-out and July 19, 2010 for the ten-year build-out. On February 15, 2006, Progeny filed a request for limited waiver of the five-year build-out deadline, and on May 24, 2006, the Commission granted Progeny a three-year extension largely because the lack of M-LMS equipment made construction impossible.[4]

In its order on reconsideration, adopted on January 31, 2007, the Commission denied a Warren Havens ("Havens") petition for reconsideration of the extensions granted to Progeny and FCR, Inc.[5] In addition, on its own motion, the Commission granted Havens an additional two years to meet the five-year construction deadline and two years to meet the ten-year construction deadline.[6] These two extensions were in addition to the three-year extension previously granted

[3] *See Location and Monitoring Service Auction Closes, Winning Bidders in the Auction of 528 Multilateration Licenses in the Location and Monitoring Service*, Public Notice, DA 99-05 (March 8, 1999).

[4] *See In the Matter of Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses*, Memorandum Opinion and Order, DA 06-1094 (2006) ("*Progeny Extension Order*").

[5] *See In the Matter of Multilateration Location and Monitoring Service Construction Requirements*, Order on Reconsideration and Memorandum Opinion and Order, DA 07-479 (2007) ("*M-LMS Reconsideration Order*").

[6] *Id*., ¶ 12. The Commission also granted a second extension to FCR, Inc., which is discussed further below.

to Havens with respect to the five-year build-out requirement. Again, the reason for a second extension was the lack of M-LMS equipment.[7]

II. THE COMMISSION SHOULD GRANT A FOUR-YEAR EXTENSION OF PROGENY'S CONSTRUCTION DEADLINES

Pursuant to Section 1.925 of the Commission's Rules, the Commission may grant a request for waiver if it is shown that:

- the underlying purpose of the rule would not be served and granting the waiver would be in the public interest, or
- application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.[8]

Further, pursuant to Section 1.946(e) of the Commission's Rules, an extension request may be granted if "the licensee shows that failure to meet the construction or coverage deadline is due to…causes beyond its control."[9]

A. Granting Progeny an Extension of Time is in the Public Interest

The first test for granting a waiver is that it would serve the public interest. In its first extension request, Progeny demonstrated its longstanding commitment to providing M-LMS services, dating back to the 1980s.[10] This commitment continues unabated. In addition,

---

[7] *Id*.

[8] *See* 47 C.F.R. § 1.925(b)(3).

[9] *See* 47 C.F.R. § 1.946(e).

[10] Progeny LMS, LLC Request for Waiver, 11-13 (filed Feb. 15, 2005).

Progeny has been an active participant in the Commission's open proceeding to revise and improve the M-LMS rules.[11]

In granting extension requests for Progeny and the other M-LMS licensees, the Commission has found that extending the construction deadlines was in the public interest. Specifically, the Commission granted a second extension to Havens last year by finding that strict application of the construction requirement would be contrary to the public interest, and that granting additional time would be in the public interest.[12]

The public benefits involved in allowing Progeny and other licensees sufficient time to provide services for homeland security and other important applications that require a high degree of service reliability remain unchanged. Progeny has had discussions with the Department of Homeland Security and critical infrastructure entities regarding location monitoring services, and remains committed to developing innovative public safety and security M-LMS services that promote the highest and best use of the 902 – 928 MHz band.

The Commission has a demonstrated interest in promoting the highest and best use of licensed spectrum, even when it is not for homeland security and public safety. In the Commission's *WCS Extension Order*, the Commission agreed with the WCS licensees that the most viable business model for the spectrum was advanced wireless services and that it would not be in the public interest for the licensees to build stop-gap systems intended to preserve their

[11] *See Amendment of the Commission's Part 90 rules in the 904-909.75 and 919.75-928 MHz Bands*, WT Docket No. 06-49, Notice of Proposed Rulemaking, 21 FCC Rcd 2809 (2006).

[12] *See M-LMS Reconsideration Order*, ¶ 11.

licenses.[13] Likewise, in the *FCI 900, Inc. Extension Order*, the Commission extended the five-year construction deadline to allow the licensees to deploy advanced digital services using equipment that was not yet available, rather than deploying existing analog facilities.[14]

With regard to M-LMS, there is a similar value in allowing M-LMS licensees to deploy advanced technologies when they become available. As explained below, however, there are no stop-gap solutions based on less advanced technologies that are available to deploy. The need for an extension of time is therefore more compelling for M-LMS licensees in order to permit manufacturers to complete development of equipment that can be used to provide beneficial M-LMS services on a shared basis with other users of the 900 MHz M-LMS spectrum band.

B. The Necessary M-LMS Equipment is Not Available

In considering whether to grant a waiver of its rules, the Commission not only examines whether the public interest would be served, but also considers whether application of the rule would be inequitable, and unduly burdensome,[15] and whether the applicant has no reasonable alternative due to causes beyond its control.[16]

---

[13] *See Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses; Request of WCS Wireless, LLC for Limited Waiver of Construction Deadline for 16 WCS Licenses; Request of Cellutec, Inc. for Limited Waiver of Construction Deadlines for Stations KNLB242, KNLB216 in Guam/Northern Mariana and American Samoa*, WT Docket No. 06-102, Order, 21 FCC Rcd 14134, 14140-41, ¶ 13 (2006) ("*WCS Extension Order*").

[14] *See FCI 900, Inc. Expedited Request For 3-Year Extension of 900 MHz Band Construction Requirements and Neoworld License Holdings, Inc. Request For Waiver of 900 MHz Band Construction Requirements and Petition for Declaratory Rulemaking*, Memorandum Opinion and Order, 16 FCC Rcd 11072, 11075, 11076-77, ¶¶ 5-6 (2001).

[15] *See* 47 C.F.R. § 1.925(b)(3).

[16] *See* 47 C.F.R. § 1.946(e).

As demonstrated below, it is primarily the inability to procure M-LMS equipment, and the causes of that inability, that makes application of the construction deadline inequitable and unduly burdensome. Further, the absence of M-LMS equipment is due to causes beyond Progeny's control, and leaves Progeny no alternative but to request this extension.

1. Widespread Introduction and Use of GPS Receivers Has Obviated Much of the Need for Multilateration Systems and Made Manufacturers Reluctant to Invest in Such Equipment

As the Commission is well aware, several changes in the communications landscape beyond Progeny's control have occurred that have made the development of M-LMS equipment more difficult. The introduction of Global Positioning Satellite ("GPS") location services just a few months after the Commission adopted rules for M-LMS, the removal of Selective Availability just a few months after the auction at which Progeny bought its licenses,[17] and the Commission's E-911 requirements for wireless carriers (that greatly expanded adoption of GPS technology in mobile phones), have obviated much of the need for multilateration systems and made manufacturers reluctant to invest in such equipment.

This reality is similar to the situation in the *MariTEL Extension Order*, wherein the Commission granted an extension of time to meet the five-year construction requirement in part because the widespread availability of cellular and PCS services to the maritime community drastically reduced the demand for MariTel's proposed VHF Public Coast service.[18]

---

[17] *See Statement by the President Regarding the United States' Decision to Stop Degrading Global Positioning System Accuracy*, Office of Science and Technology Policy (May 1, 2000), http://www.gpsforvfr.com/white_house.htm.

[18] *See MariTEL, Inc.; Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses*, Memorandum Opinion and Order, 22 FCC Rcd 14074, 14076, ¶ 3 (2007).

2. There is Currently No M-LMS Equipment Available for Purchase and Use in the United States

The Commission has recognized as recently as last year that there is no M-LMS equipment available for use in the United States, which renders construction and operation of an M-LMS service impossible. In the 2007 *M-LMS Reconsideration Order*, the Commission determined that "no M-LMS licensee provides service today" and "the record before us confirms that no viable M-LMS equipment is available for deployment in the United States today."[19]

Havens recently filed an *ex parte* letter in the M-LMS rulemaking docket claiming that Intelligent Transportation Service ("ITS") wireless technology is available, and equipment can be developed if the appropriate time and resources are spent.[20] Specifically, Havens points to TETRA, a technology developed by the European Technical Standards Institute, as the answer for ITS service.

There are two important reasons why Progeny, or any other M-LMS licensee, cannot use TETRA to provide M-LMS service in the United States. First, as stated in Havens' own filing, "TETRA…to date is still not sold in the US due to Motorola's assertions that it will sue, for patent infringement, entities…that buy and use TETRA in the US."[21] Second, also as stated in

[19] *See M-LMS Reconsideration Order*, ¶ 5.

[20] *See Ex Parte of ATLIS Wireless LLC, Telesaurus VPC LLC, AMTS Consortium LLC, Telesaurus Holdings LLC, Skybridge Spectrum Foundation, Intelligent Transportation Wireless LLC*, WT Docket No. 06-49 (March 7, 2008).

[21] *Id*. at 2.

Havens' own filing, TETRA does not address M-LMS multilateration radiolocation technology.[22]

Havens filed a second *ex parte* letter recently in the rulemaking docket in which he touts pseudolites as "the essential technology for the multilateration component of LMS-M systems" and includes an article on the technology.[23] Havens, however, admits in his filing that the use of pseudolites is in its infancy.[24] Furthermore, pseudolites are technically incompatible with the M-LMS spectrum band plan[25] and service rules.[26] Finally, pseudolites are not currently available as M-LMS equipment, and therefore do not bear on this Extension Request.

The early stage of all the developments cited by Havens and the spectral occupancy issue are in fact the crucial flaws in his arguments. Just because tests have been conducted with equipment occupying 20 MHz of bandwidth and operating under Part 15 of the Commission's

[22] *Id*. at 2, n.4. Havens claims to be working on legal solutions to the Motorola patent infringement issue and claims to be developing multilateration technology. Neither of these claims, however, allows M-LMS licensees such as Progeny to build-out their networks and provide service at this time or for several years to come.

[23] *See Ex Parte of ATLIS Wireless LLC, Telesaurus VPC LLC, AMTS Consortium LLC, Telesaurus Holdings LLC, Skybridge Spectrum Foundation, Intelligent Transportation Wireless LLC*, WT Docket No. 06-49 (March 17, 2008).

[24] *See id. at 3.*

[25] Pseudolites are basically out-banded GPS hardware and thus generate a 20 MHz carrier centered on 915 MHz. Clearly, a 20 MHz carrier cannot fit within any of the blocks assigned to M-LMS service, thus making pseudolites, as currently available, useless for implementation in the M-LMS band segments.

[26] Pseudolites do not comply with the definition of M-LMS, which requires at least three separate receive stations to identify the location of a device through the use of time and/or angle of arrival. *See* 47 C.F.R. § 90.155(e).

Rules, does not mean that equipment embodying this technology can be easily transferred to a commercial network deploying under the M-LMS rules.[27]

The availability of M-LMS equipment has not changed since last year when the Commission recognized the fact that equipment was not available and granted Havens and FCR, Inc. second extensions of time to meet the construction requirements. This fact makes compliance with the construction deadline an impossibility and imposition of the deadline inequitable and unduly burdensome.

3. The Sharing Regime Imposed in the Band and Strict Testing Requirements Imposed on M-LMS Services Have Hindered Development of M-LMS Equipment

The Commission has recognized that the unique sharing regime imposed on the band has caused difficulty for the manufacture of M-LMS equipment. In the *Progeny Extension Order*, the Commission stated that its reasons for granting the Havens extension applied equally to the Progeny request for an extension.[28] One of the reasons recognized by the Commission was "spectrum sharing in the M-LMS band—among government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and

---

[27] The Commission reached a similar conclusion last month when it granted licensees in the Local Multipoint Distribution Service ("LMDS") a four-year extension of their build out deadlines. The Commission concluded that such an extension was warranted even though LMDS equipment may soon become available. *See Applications Filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service, DA 08-54; Petition of Members of the Rural LMDS Group for Waiver of Section 101.1011 of the Commission's Rules and Extension of Construction Deadline; Request by Members of the LMDS Coalition for Waiver and Limited Extension of Deadline for Establishing Compliance with Section 101.1011(a) LMDS Substantial Service Requirements; Petition of IDT Spectrum, LLC for Waiver and Extension of Time to Meet Substantial Service Requirements Found in Section 101.1011 of the Commission's Rules*, Memorandum Opinion and Order, DA 08-867, ¶ 25 (rel. Apr. 11, 2008) ("*LMDS Extension Order*").

[28] *Progeny Extension Order*, ¶ 13.

licensed M-LMS operations—has hindered the ability of licensees to secure equipment."[29] This sharing regime remains an impediment to procuring suitable M-LMS equipment.

In addition, Section 90.353(d) of the Commission's rules requires that an M-LMS licensee demonstrate in field tests that its equipment does not interfere with unlicensed services in the band.[30] This requirement is very difficult for manufacturers to address when considering the design and manufacture of M-LMS equipment. Unlicensed devices, regulated under Part 15 of the Commission's Rules, can emit and receive many different power levels, modulations, and signal characteristics. These propagation values and the number of devices using them change constantly, as new unlicensed devices are type approved. As a result, there is no way to accurately predict by computer analysis and simulation, whether equipment will be marketable prior to fully developing it.

In its order granting a three-year extension of the ten-year construction requirement for WCS licensees, the Commission was persuaded that the "relatively restrictive [out-of-band emission] limits may have impeded the development of WCS equipment and have contributed to the unique circumstances of the band."[31] A similar situation exists in the M-LMS band with respect to the testing requirements described above.

4. Other M-LMS Licensees Face Similar Difficulties Prompting the Commission to Grant Second Extensions to Complete Construction

Progeny is not alone in its inability to secure the necessary M-LMS equipment to build-out its system and begin providing service. As discussed above, in the 2007 *M-LMS*

[29] *Id*.

[30] *See* 47 C.F.R. § 90.353(d).

[31] *WCS Extension Order*, ¶ 10.

Reconsideration Order, the Commission determined that "no M-LMS licensee provides service today…."[32] All M-LMS licensees have received at least one extension of the construction deadlines, and Havens and FCR, Inc. have received two. Several licensees now have five-year construction deadlines in 2009 and ten-year construction deadlines in 2011.

There is Commission precedent for considering the common fate of licensees in granting extensions of construction requirements. In the *MariTEL Extension Order*, the Commission granted an extension, relying in part on the fact that it was not presented "with a situation in which a licensee's request for additional time to construct authorized facilities is undermined by the fact that similarly situated licensees have managed to meet the same construction deadline."[33] In fact, no M-LMS licensee has yet met the five-year construction deadline. In the *MariTel Extension Order*, the Commission tied this fact closely to whether the licensee's failure to construct is due to circumstances within the licensee's control.[34]

The fact that similarly situated licensees face the same hardships as Progeny and have not met the construction requirements provides compelling evidence that the inability to construct an M-LMS system is due to circumstances beyond Progeny's control and argues in favor of granting this Extension Request. To impose the current construction requirements on Progeny would be inequitable and unduly burdensome.

[32] *See M-LMS Reconsideration Order*, ¶ 5.

[33] *MariTEL Extension Order*, ¶ 9.

[34] *Id*.

5. Progeny Has Engaged in Diligent Attempts to Procure M-LMS Equipment

In the *Progeny Extension Order*, the Commission found that Progeny had "sought to develop equipment and applications for its M-LMS spectrum, but, like Mr. Havens and FCR, has been unsuccessful."[35] The Commission recognized that Progeny had "retained third parties to explore equipment and applications development, contacted numerous entities itself regarding such development, and consulted various equipment vendors and developers."[36]

Since its first extension was granted, Progeny has continued to make diligent efforts to procure M-LMS equipment in order to construct its system and provide service. For example, beginning in 2006, Progeny has sponsored research at Purdue University to study uses of the M-LMS band and assess the Enhanced Position Location technology developed by Dr. Rajendra Singh, for which a patent application has been filed.[37] In addition, Progeny has undertaken other development efforts that are described in Attachment A, which are proprietary and confidential, and filed under seal with the Commission.

C. A Full Four-Year Extension of Progeny's Construction Deadlines is Necessary

Progeny requests a four-year extension of its construction deadlines because it must design, develop and deploy its own equipment in order to provide M-LMS service. Progeny must also extensively test its system according to the burdensome rules discussed above. An

[35] *Progeny Extension Request*, ¶ 5.

[36] *Id*.

[37] *See Progeny LMS Taps Purdue University for Wireless Telecommunications Study*, BNET Business Network (Dec. 11, 2006), http://findarticles.com/p/articles/mi_m0EIN/is_2006_Dec_11/ai_n16911022.

extension of any period less than four years will be inadequate for Progeny to accomplish these tasks and provide sufficient service to satisfy its construction requirements.

In a comparable situation, last month the Commission recognized that the lack of "viable, affordable equipment" available to licensees in another wireless service, the LMDS, warranted the grant of a four-year extension of the licensees' construction deadline.[38]

Progeny's request for a four-year extension of its five-year construction deadline would extend the deadline to July 19, 2012, which is two years after its license renewal deadline of July 19, 2010. The Commission has previously extended the first build-out deadline of wireless licensees beyond the end of their initial license term. In the *WCS Extension Order*, the Commission granted a three-year extension of the ten-year construction deadline for WCS licensees.[39] The original ten-year construction deadline for WCS licensees coincided with their renewal deadline. The three-year extension therefore delayed the build-out deadline until three years after the license renewal date.

If this Extension Request is granted, like the WCS licensees, Progeny will be required to file a renewal application, but will not be required to have met build-out requirements before that time. Instead, any renewal that is granted by the Commission to Progeny can be conditioned on its subsequent compliance with its construction requirements.

[38] *See LMDS Extension Order*, ¶ 24.

[39] *See WCS Extension Order*, ¶ 9.

D. Due to the Unique Sharing Requirements of the Band, the Spectrum Will Not Lie Fallow

The Commission historically has legitimate concerns about spectrum lying fallow due to failure to meet construction requirements. As discussed above, however, the Commission has recognized the unique sharing requirements of the M-LMS band. In addition to the fact that this sharing regime causes difficulties for manufacturing M-LMS equipment, it also means that the 902 – 928 MHz band is not currently, and will not be, under-utilized. M-LMS licensees share the band with Federal Government radiolocation systems, ISM devices, licensed amateur radio operations and unlicensed Part 15 equipment. The Commission has determined that "the 902 – 928 MHz band is already heavily used by other licensed and unlicensed services for a wide variety of purposes. Consequently, even if a multilateration LMS licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible."[40] The normally important Commission concern regarding under-utilization of public spectrum is not an issue in this Extension Request. As discussed further above, however, the Commission should remain committed to adding the important M-LMS services that will be offered by Progeny to the band.

III. CONCLUSION

The Commission should grant this Extension Request, as it has done for other similarly situated M-LMS licensees, because application of the current construction deadlines would be inequitable and unduly burdensome, and an extension is in the public interest.

[40] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, PR Docket No. 93-61, Second Report and Order, 13 FCC Rcd 15182, 15197-15298, ¶ 30 (1998).

As the Commission has recognized, no M-LMS equipment is currently available and the band remains heavily used due to the unique sharing regime imposed so the spectrum is not being under-utilized.

Respectfully submitted,

PROGENY LMS, LLC

By: _____

Bruce A. Olcott
Joshua T. Guyan
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6615

Its Attorneys

May 1, 2008

NEXT DOCUMENT

EXHIBIT 8 FOLLOWS

SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044-0407

Office: +1.202.626.6600
Fax: +1.202.626.6780

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

Direct Dial: 202.626.6615
bolcott@ssd.com

February 4, 2008

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Progeny LMS, LLC
Permitted Oral *Ex Parte* Presentation
WT Docket No. 06-49

Dear Ms. Dortch:

On February 1, 2008, representatives of Progeny LMS, LLC ("Progeny") held two meetings with representatives of the Federal Communications Commission regarding the above captioned proceeding. Participating for the Commission in the first meeting were Aaron Goldberger, Legal Advisor to the Chairman, and Julius Knapp and Ira Keltz of the Office of Engineering and Technology. Participating for the Commission in the second meeting were Chairman Kevin Martin and Aaron Goldberger. Participating for Progeny in the first meeting were Rajendra Singh, Harold Furchtgott-Roth, Carson Agnew, Janice Obuchowski, Ron Olexa, and Amy Mehlman, and in the second meeting were Harold Furchtgott-Roth and Amy Mehlman.

During the meetings, the parties discussed Progeny's positions on proposed technical rules for the M-LMS spectrum band, which are reflected in detail in the comments and written *ex parte* letters filed by Progeny in the proceeding. The Commission was urged to adopt rules that would help to ensure that the M-LMS spectrum band could be used in a more efficient and robust manner, without resulting in harmful interference to unlicensed equipment in the band.

Please contact the undersigned if you have any questions.

Sincerely,

Bruce A. Oleott

NEXT DOCUMENT

EXHIBIT 9 FOLLOWS

EXHIBIT 9

SQUIRE, SANDERS & DEMPSEY L.L.P.

Suite 500
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Office: +1.202.626.6600
Fax: +1.202.626.6780

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

Direct Dial: 202.626.6615
bolcott@ssd.com

January 22, 2008

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Progeny LMS, LLC
Written Ex Parte Presentation
***Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands*,**
WT Docket No. 06-49

Dear Ms. Dortch:

On January 16, 2008, Warren C. Havens filed an *ex parte* letter in the above referenced docket, attaching a petition for reconsideration that Havens filed of the transfer of control of Progeny LMS, LLC ("Progeny"), which was consented to by the Commission on December 8, 2007 and consummated on December 20, 2007. *See* File Nos. 0003250058 and 0003274382.

Havens' petition is procedurally defective and raises issues that are either factually inaccurate or are not relevant to the transfer of control proceeding. On this date, Progeny filed an opposition to Havens' petition identifying the errors in Havens' arguments. Progeny's opposition was appropriately filed in Progeny's transfer of control proceeding.

Havens' petition is in no way related to the M-LMS flexibility rulemaking proceeding and does not belong in this docket. The Commission should therefore disregard Havens' petition in its preparation of an order authorizing increased flexibility for M-LMS licensees and more productive and efficient use of the M-LMS spectrum band.

Thank you for your attention to this matter. Please let us know if you have any questions.

Sincerely,

Bruce A. Olcott
Joshua T. Guyan

NEXT DOCUMENT

EXHIBIT 10 FOLLOWS

FREEDOM
TECHNOLOGIES
INCORPORATED

May 16, 2007

***Ex Parte* Presentation**
Via Electronic Submission

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket No. 06-49*

Dear Ms. Dortch:

Progeny LMS, LLC ("Progeny") respectfully asks the Commission to disregard a May 7, 2007 *ex parte* notice filed by Havens' affiliates ("Havens").[1]

The contentions raised in this filing are unsubstantiated in fact and unsupported by the FCC's own rules and regulations, simply marking another in a long series of attempts by Havens to divert this proceeding with issues that are nongermane to the above-mentioned Notice of Proposed Rulemaking ("NPRM") regarding Multilateration Location and Monitoring Service.[2]

Specifically, these issues were addressed and closed by the Commission in 1999 and the FCC has been fully aware of the relevant facts surrounding the licenses at every necessary juncture.[3]

ADVANCED IDEAS
IN COMMUNICATIONS

1 The filing was authored by Warren Havens, who assigned all his LMS licenses to Telesaurus Holdings GB, in which he has a controlling interest, on or about February 13, 2006 and filed on behalf of entities in which he has a controlling interest. *See* Telesaurus Holdings GB, Ex Parte Presentation, *Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, (LMS NPRM),* WT Docket No. 06-49, May 7, 2007.

2 The continued use of such stalling tactics by Havens is coming very close to abuse of process as Progeny has pointed out previously. *See* Progeny LMS, LLC, Ex Parte Presentation, *Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, (LMS NPRM),* WT Docket No. 06-49, April 27, 2007.

1317 F Street, N.W.
4th Floor
Washington, D.C. 20004
(202) 371-2220
Fax (202) 371-1497

3 *See* FCC Public Notice, Location and Monitoring Service, Application Accepted for Filing Auction Event No. 21, DA 99-2712, rel. December 6, 1999, which references Progeny's amended long-form application. In May 2000, the Commission indicated it was prepared to grant Progeny's

While groundless, Havens' persistent personal attacks are also out of bounds with reference to the instant proceeding: They are not material to the pending NPRM and should be disregarded by the FCC in the context of the present proceeding. This is evidently another attempt to cloud the record and impede the FCC's ongoing rulemaking. Progeny urges the Commission not to be distracted by such last-minute activities not related to the substance of this proceeding.

We respectfully ask the Commission to quickly make a decision on the basis of the full record that has already been compiled in this docket.

In accordance with Section 1.1206(b) of the Commission's Rules, this letter is being filed with your office. Should you have any questions or concerns in connection with this submission, please contact me at (202) 371-2800.

Respectfully submitted,

Janice Obuchowski

ADVANCED IDEAS
IN COMMUNICATIONS

1317 F Street, N.W.
4th Floor
Washington, D.C. 20004
(202) 371-2220
Fax (202) 371-1497

licenses upon full and timely payment. *See* FCC Public Notice, Wireless Telecommunications Bureau Announces It Is Prepared to Grant Location and Monitoring Service Licenses After Final Payment is Made, DA 00-989, May 4, 2000.

NEXT DOCUMENT

EXHIBIT 11 FOLLOWS

April 27, 2007

***Ex Parte* Presentation**
Via Electronic Submission

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket 06-49

Dear Ms. Dortch:

On April 23, 2007, Telesaurus, controlled by Warren Havens, submitted an e-mail Havens sent to the Commissioners and Commission staff in the above-captioned proceeding.[1] Progeny submits that Havens' filing represents yet another attempt to stall this proceeding. It is procedurally flawed and not germane to the above-captioned rulemaking.

Havens' filing contains assertions that: (1) Reiterate previous arguments that Progeny has fully addressed in its Comments, Reply Comments and Ex Parte filings; (2) Misrepresent the purpose and conclusion of cited studies; (3) Make unsubstantiated, *ad hominem* attacks on Progeny and the integrity of the Commission.[2] These arguments are irrelevant and merely represent attempts to stall this proceeding, which is ripe for decision.[3] The Commission should dismiss the filing as procedurally flawed.

Havens has repeatedly disregarded the Commission's procedures and attempted to inject non-germane matters into the proceeding.[4] This latest e-mail, which makes unsubstantiated and unfounded allegations against Progeny, its principal owner, an affiliated party, and the integrity of the

ADVANCED IDEAS
IN COMMUNICATIONS

[1] E-mail to Commissioners, aides, and Bureau staff sent by Warren Havens (April 23, 2007) (The E-mail).

[2] Havens' filing also does not contain all the attachments as referenced within itself.

[3] The Commission should only consider relevant comments and material of record in taking final action. *See*, 47 C.F.R. §1.425.

[4] *See Ex Parte* Presentation by Progeny LMS, In the Matter of Amendment of the Commission's Part 90 Rules, WT Docket 06-49 (August 1, 2006).

1317 F Street, N.W.
4th Floor
Washington, D.C. 20004
(202) 371-2220
Fax (202) 371-1497

FREEDOM
TECHNOLOGIES
INCORPORATED

Commission and its staff, is simply a further effort to try to redirect these proceedings to matters that are beyond the scope of issues raised by the Commission in last year's Notice of Proposed Rulemaking. These arguments and allegations, should they be considered at all, belong elsewhere and should not be confused with this instant service rule proceeding.[5] Moreover, his continued use of such tactics come close to crossing the line into abuse of process.[6]

Finally, Havens' e-mail filing is procedurally defective. Under the Commission's rules, any written *ex parte* presentation "must be labeled as an *ex parte* presentation."[7] Havens' filing does not satisfy this regulatory requirement. Thus, the Commission may impose any sanctions that may be appropriate.[8]

Progeny is confident that the Commission will see Havens' filing as the unwarranted delaying tactic that it is and disregard it as both procedurally flawed and extraneous to the NPRM. The Commission has a full record to bring this proceeding to a conclusion without being distracted by Havens' arguments and unsubstantiated attacks on Progeny and the Commission.

In accordance with Section 1.1206(b) of the Commission's Rules, please accept this filing. Should you have any questions or concerns in connection with this submission, please contact me at (202) 371-2800.

Sincerely,

Janice Obuchowski

ADVANCED IDEAS
IN COMMUNICATIONS

1317 F Street, N.W.
4th Floor
Washington, D.C. 20004
(202) 371-2220
Fax (202) 371-1497

[5] Havens has tried similar tactics in other FCC proceedings in the past to stall the proceedings or inject non-germane material. The Commission has steadfastly rejected such attempts in those proceedings. *See generally*, supra note 2.

[6] *See* Policy Regarding Character Qualifications In Broadcast Licensing, *Report, Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd. 421 (1986), *appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (*Character Policy Statement*) (strike pleadings, harassment of opposing parties, and violation of *ex parte* rules constitute abuse of process). The *Character Policy Statement* has been applied by the Commission in non-broadcast situations. See e.g., *Western Telecommunications, Inc.*, 3 FCC Rcd. 6405, 6406 ¶ 12 (1988) (*Character Policy Statement* used to evaluate microwave radio licensees); *A.S.D. Answer Service, Inc.*, 1 FCC Rcd. 753, 754 ¶ 12 (1986) (*Character Policy Statement* applied to domestic public radio service application).

[7] 47 C.F.R. §1.1206(b)(1).

[8] 47 C.F.R. §1.1216(a).

NEXT DOCUMENT

EXHIBIT 12 FOLLOWS

FCR, INC.

Exhibit 1

FCR, Inc. ("FCR"), through no fault of its own, has been unable to meet the build-out dates specified in the following construction permits for new Location Monitoring Service facilities, and hereby requests an extension of time to and including July 14, 2007 to complete construction:

WPOJ871	BEA008	Buffalo-Niagara Falls, NY-PA
WPOJ872	BEA034	Tampa-St. Petersburg-Clearwater, FL
WPOJ873	BEA040	Atlanta, GA-AL-NC
WPOJ874	BEA055	Cleveland-Akron, OH-PA
WPOJ875	BEA153	Las Vegas, NV-AZ-UT

All of the above authorizations have a 1st build-out date of July 14, 2004. FCR is unable to construct because FCR, despite diligent effort, has not been able to find equipment that operates in this service.

FCR holds 13 of the 486 authorizations auctioned in both Auction 21 and Auction 39.[1] As such, it is very much at the mercy of the larger authorization holders and the applications they develop.[2] FCR has been told that the development of equipment to operate in this service with the limitations and protections set out in the Rules would be prohibitively expensive unless the equipment had a wide application throughout the LMS service.

FCR has been working ever since the auction (21) to start a viable LMS system. It was aware of the grandfathered operations in Miami and elsewhere using equipment supplied by Tadiran. It was also aware of the operations of Tadiran in Israel in providing multilateration location monitoring services. In fact, Tadiran's equipment was developed to meet Israeli standards, not US LMS standards. What FCR did not know was that Tadiran was the *only* provider of equipment for this service and that the equipment had significant limitations at that time, including problems operating in an urban environment, and that the system was operated with various degrees of inaccuracy that made it commercially non-viable. It apparently never operated with the anything close to the reliability and accuracy of GPS. FCR met with a representative of Tadiran and thoroughly explored the functioning of the system and it was during that meeting that the limitations became apparent. FCR was advised that the manufacturer was attempting to

[1]The remaining 42 LMS licenses were due to be auctioned, in January 2002, in Auction 43. Due to a lack of interest in the 42 remaining LMS licenses, however, the LMS portion of that auction was postponed and, to date, has not been rescheduled.

[2]The major authorization holders are Progeny LMS, LLC; Telesaurus Holdings GB, LLC; and PCS Partners.

refine the product. Since then, to the best of FCR's knowledge, the provider has ceased production and operation of the LMS-like system in Israel.

As previously noted, Progeny LMS, LLC ("Progeny") is a major holder of authorizations in the Location Monitoring Service. In March of 2002, Progeny filed a Petition for Rulemaking to make changes to the LMS Rules (*see* RM-10403). If Progeny's proposals are adopted, in whole or in part , the Rule changes will have a significant impact both on the equipment that is designed for LMS and the basic system layout. To date, there has been no action by the Commission on the petition, but the mere existence of RM-10403 and the changes proposed therein introduces an element of uncertainty that inhibits the development of LMS.

Progeny, in its above-referenced petition for rulemaking, describes the present state of equipment as follows:

> Progeny has diligently been seeking to implement service, but it has been unable to do so because of, *inter alia,* the absence of suitable equipment. As a result of the various limitations which currently apply to LMS licensees, manufacturers apparently have been unwilling to commit the resources necessary to design and develop equipment that will support the narrow offerings LMS licensees can provide under the current rules. Manufacturers do not perceive that there is a market, given current regulatory restraints, to justify such significant investments.
>
> In an effort to move forward to provide service using its LMS licenses, Progeny has held discussions with a virtual "Who's Who" of American manufacturers of telecommunications equipment. The response from several of the largest equipment suppliers, as well as from more entrepreneurial providers, has been consistent: the narrow "market" for a stand-alone location and monitoring service (particularly with the constraints imposed by the Commission) will not be sufficient to justify the time and expenses necessary to develop equipment for that market. The feedback has been uniform. For example, one equipment supplier said that both its regulatory team and its engineers had examined the possibility of manufacturing equipment and investing capital to develop the LMS spectrum. They concluded that, given the regulatory restrictions that govern the spectrum, the company could not justify any investment in LMS. Another service provider opined that, given the onerous regulations that apply, Progeny would not find any company that would take the risk of developing LMS equipment. Other prospects concluded that the band would not be viable without "real time interconnectivity" to the public switched network. Further opinion was offered that GPS had "rendered the LMS band antiquated."
>
> Moreover, this problem of equipment unavailability is exacerbated by the current status of the telecommunications equipment manufacturing sector. Equipment manufacturers in general have seen their stock prices plummet

> and their sources of capital dry up, thus making it even more unlikely that any manufacturer will risk investing its limited research and development resources in equipment for LMS. [*Footnote in original: By way of example, industry leaders Lucent and Nortel Networks shares have both traded above $80 per share (in mid-1999 and early-2000, respectively), but both companies' shares were priced as low as less than $6 per share in trading during mid-February 2002.*] The market is unproven at best, and as discussed herein, the severe service restrictions and emergence of deep-pocketed competitors (CMRS carriers who are now required to incorporate location capabilities in their systems) make it unlikely that LMS will develop under the current limitations. Thus, Progeny does not anticipate any solution to the current dilemma caused by the absence of equipment for LMS, absent changes to the Commission's Rules.

Also holding a large number of LMS authorizations are Warren C. Havens and Telesaurus Holdings GB, LLC. In December of 2003, they simultaneously notified the Commission that they were undertaking to design equipment for the LMS service and asked the Commission to extend until expiration their LMS build-out requirements so that their development efforts would not be wasted.[3] To date, the Commission has not acted. However, Havens addressed the equipment issues as follows in that waiver request:

> Prior to the auction of LMS-M EA-based licenses, including the Licenses, one company, Teletrac, acquired and operated first-generation LMS-M equipment provided by an equipment supplier, Tadiran. No other company has produced equipment for commercial LMS-M stations. [*Footnote in original: In the 1990's, other companies had to varying degrees worked on development of LMS-M equipment, as evidenced in the various LMS rulemaking documents. However, only Tadiran produced equipment actually used in commercial operation.*] This equipment provided basic location and associated short "status" messaging. Havens investigated this equipment soon after the auction of LMS-M licenses in early 1999; however, it was no longer commercially available.[*Footnote in original: Shortly after the first auction of LMS-M licenses in year 1999, the Teletrac President informed Havens that Teletrac cancelled its equipment supply contract with Tadiran. He also provided to Havens contact information to key persons at Tadiran. Tadiran did not respond to several inquires by Havens concerning their multilateration equipment. In addition, it is clear that if Tadiran was still seeking to provide this equipment to the market, it would have contacted Havens since he held the majority of the A block licenses in the nation, and the equipment it provided to Teletrac was specifically A-block LMS-M equipment. (Teletrac held only A-block LMS-*

[3] *See* Request for Partial Waiver file by Warren C. Havens for an extension of the buildout dates for WPOS5876 et al., page 3.

M licenses.)] In addition, it failed in the marketplace and, even if still available, it would not meet current and future marketplace application demands, [*Footnote in original: Havens spent considerable time discussing, under confidentiality agreement, with staff of Teletrac including its then President, the experience it had in the marketplace, its equipment, etc. Reasons for this failure (and why others using such equipment if it were again made commercially available would also fail) include, per Havens understanding, the following. To be successful in the marketplace, the equipment must provide both efficient and accurate location with a high level of spectrum efficiency (see preceding footnote), as well as voice and data communications permitted under section 90.353 (b) and (c), also with spectrum efficient technology. A location-only service will not be successful, from all the evidence in the marketplace. As the Commission knows, all the major CMRS operators plan to provide or are already rolling out a variety of location based services since they must have the core location capability in place for E911. The Teletrac multilateration service, apart from the location function, provided only short-status message service. It failed in the marketplace even before this rollout of CMRS location services*.] nor FCC goals and operator needs for spectrum efficiency. [*Footnote in original: Before Teletrac filed for bankruptcy and was sold, Havens visited Teletrac, executed a confidentiality agreement, and obtained and reviewed with an engineering consultant, details regarding the Teletrac- Tadiran equipment. It was not spectrum efficient (compared to current and emerging technologies) nor did it have any communication capabilities other than very low-rate data for status messaging.*]

For whatever the reason, the fact remains that, to the best of FCR's knowledge, no equipment is available to LMS authorization holders. Absent equipment availability, FCR, Inc. cannot construct an LMS system. The requested three-year extension of the build-out requirement should allow for resolution of the regulatory issues and development of the necessary equipment.

NEXT DOCUMENT

EXHIBIT 13 FOLLOWS

ATTACHMENT

Helen Wong-Armijo ("HWA"), through no fault of her own, has been unable to meet the first build-out date specified in the following construction permits for new location monitoring service facilities; accordingly, this is to request an extension of time to and including October 5, 2009, for HWA to complete construction of the following LMS licenses

License Number	Service Status	Expiration Date
WPTH955	LS Active	10/05/2011
WPTH956	LS Active	10/05/2011
WPTH957	LS Active	10/05/2011
WPTH958	LS Active	10/05/2011
WPTH959	LS Active	10/05/2011
WPTH960	LS Active	10/05/2011
WPTH961	LS Active	10/05/2011
WPTH962	LS Active	10/05/2011
WPTH963	LS Active	10/05/2011
WPTH964	LS Active	10/05/2011
WPTH965	LS Active	10/05/2011
WPTH966	LS Active	10/05/2011
WPTH967	LS Active	10/05/2011
WPTH968	LS Active	10/05/2011
WPTH969	LS Active	10/05/2011
WPTH970	LS Active	10/05/2011
WPTH971	LS Active	10/05/2011
WPTH972	LS Active	10/05/2011
WPTH973	LS Active	10/05/2011
WPTH974	LS Active	10/05/2011
WPTH975	LS Active	10/05/2011
WPTH976	LS Active	10/05/2011
WPTH977	LS Active	10/05/2011
WPTH978	LS Active	10/05/2011
WPTH979	LS Active	10/05/2011
WPTH980	LS Active	10/05/2011
WPTH981	LS Active	10/05/2011
WPTH982	LS Active	10/05/2011

License Number	Service	Status	Expiration Date
WPTH983	LS	Active	10/05/2011
WPTH984	LS	Active	10/05/2011
WPTH985	LS	Active	10/05/2011
WPTH986	LS	Active	10/05/2011
WPTH987	LS	Active	10/05/2011
WPTH988	LS	Active	10/05/2011
WPTH989	LS	Active	10/05/2011
WPTH990	LS	Active	10/05/2011
WPTH991	LS	Active	10/05/2011
WPTH992	LS	Active	10/05/2011
WPTH993	LS	Active	10/05/2011
WPTH994	LS	Active	10/05/2011
WPTH995	LS	Active	10/05/2011
WPTH996	LS	Active	10/05/2011
WPTH997	LS	Active	10/05/2011
WPTH998	LS	Active	10/05/2011
WPTH999	LS	Active	10/05/2011
WPTI200	LS	Active	10/05/2011
WPTI201	LS	Active	10/05/2011
WPTI202	LS	Active	10/05/2011
WPTI203	LS	Active	10/05/2011
WPTI204	LS	Active	10/05/2011
WPTI205	LS	Active	10/05/2011
WPTI206	LS	Active	10/05/2011
WPTI207	LS	Active	10/05/2011
WPTI208	LS	Active	10/05/2011
WPTI209	LS	Active	10/05/2011
WPTI210	LS	Active	10/05/2011
WPTI211	LS	Active	10/05/2011
WPTI212	LS	Active	10/05/2011
WPTI213	LS	Active	10/05/2011
WPTI214	LS	Active	10/05/2011
WPTI215	LS	Active	10/05/2011
WPTI216	LS	Active	10/05/2011
WPTI217	LS	Active	10/05/2011
WPTI218	LS	Active	10/05/2011
WPTI219	LS	Active	10/05/2011
WPTI220	LS	Active	10/05/2011
WPTI221	LS	Active	10/05/2011
WPTI222	LS	Active	10/05/2011
WPTI223	LS	Active	10/05/2011
WPTI224	LS	Active	10/05/2011
WPTI225	LS	Active	10/05/2011
WPTI226	LS	Active	10/05/2011

License Number	Service Status	Expiration Date
WPTI227	LS Active	10/05/2011
WPTI228	LS Active	10/05/2011
WPTI229	LS Active	10/05/2011
WPTI230	LS Active	10/05/2011
WPTI231	LS Active	10/05/2011
WPTI232	LS Active	10/05/2011
WPTI233	LS Active	10/05/2011
WPTI234	LS Active	10/05/2011
WPTI235	LS Active	10/05/2011
WPTI236	LS Active	10/05/2011
WPTI237	LS Active	10/05/2011
WPTI238	LS Active	10/05/2011

All of the above authorizations have a first build-out date of October 5, 2006, and HWA has been unable to construct the facilities because there is no equipment available within the marketplace. As will be shown below, HWA has made significant and diligent efforts to locate equipment and develop a viable business plan.

A consultant to HWA had worked on finding LMS equipment as a consultant to other licensees. Either HWA, or her consultant (hereinafter collectively referred to as "HWA representatives" or "HWA reps") made the following efforts, among others, to locate equipment and develop a viable business plan, all without success. Negotiations were opened with Teletrac to buy the Teletrac LMS radios in one of their markets. Teletrac was trying to sell used and obsolete equipment, and not only were HWA representatives not able to make a commercially reasonable deal with them, there was a substantial question as to whether the equipment, manufactured in Israel, would comply with the technical requirements of the Commission's Rules or allow HWA's LMS system to operate in accordance with the operating Rules. Apparently, this was the only equipment that was available, because the Israeli company had stopped

manufacturing it, and Teletrac did not have nearly enough equipment to build out all of the HWA licenses.

HWA reps investigated the possibility of using LMS in part for internet service and purchased equipment for that use from another manufacturer; however, theirs was designed to operate with 0.1 watt, and tests conducted by HWA showed that the equipment was unsatisfactory for the latter's purposes.

HWA reps investigated Motorola reflex paging equipment to see if its pager transmitters could be converted for use in the LMS ranges as locator devices, also without success.

HWA reps considered using LMS for small equipment locators and discussed with an electronics engineer the possibility of his designing a small locator device. By then, there were a number of requests pending at the Commission to change the LMS Rules, and neither HWA nor anyone else had any idea what the new Rules would be. Of course, the marketplace itself had changed rapidly since 2001. Within the past two years, cellular and PCS systems began offering location services via inexpensive mobile phones. For example, Verizon Wireless recently launched its VZ Navigator, which allows subscribers to pinpoint location and display a detailed map on their cellular phone display screens. Verizon states that

> VZ Navigator provides all the features of an advanced navigation system on the user's mobile phone at a fraction of the price of other GPS devices and systems. The VZ Navigator provides: heads-up, voice-prompted turn-by-turn directions with auto rerouting if you miss a turn; local search of nearly fourteen million points of interest (POIs) in the USA; and detailed color maps, that can be quickly panned and zoomed.

The cost of the VZ Navigator is less than ten dollars per month and does not require any special equipment for the subscriber to purchase.

Other LMS licensees have had, and have reported to the Commission, the same problems. Attached as Exhibit 1 is a statement submitted in connection with a 2004 extension request by FCR, Inc. (another LMS license which has also done considerable work in the area). FCR's request for extension of its first build-out-date was subsequently granted by the Commission.

Now, there is an outstanding rule making in which the Commission is investigating the possibility of changing both the technical and the service Rules applicable to LMS. During the pendency of that proceeding, and until the new Rules are established, no company can move ahead.

The requested three-year extension of the build-out requirement should allow resolution of the regulatory issues and development of the necessary equipment to proceed with the construction of LMS systems.

EXHIBIT 1

FCR, INC.

FCR, Inc. ("FCR"), through no fault of its own, has been unable to meet the build-out dates specified in the following construction permits for new Location Monitoring Service facilities, and hereby requests an extension of time to and including July 14, 2007 to complete construction:

WPOJ871	BEA008	Buffalo-Niagara Falls, NY-PA
WPOJ872	BEA034	Tampa-St. Petersburg-Clearwater, FL
WPOJ873	BEA040	Atlanta, GA-AL-NC
WPOJ874	BEA055	Cleveland-Akron, OH-PA
WPOJ875	BEA153	Las Vegas, NV-AZ-UT

All of the above authorizations have a first build-out date of July 14, 2004. FCR is unable to construct because FCR, despite diligent effort, has not been able to find equipment that operates in this service.

FCR holds 13 of the 486 authorizations auctioned in both Auction 21 and Auction 39.[1] As such, it is very much at the mercy of the larger authorization holders and the applications they develop.[2] FCR has been told that the development of equipment to operate in this service with the limitations and protections set out in the Rules would be prohibitively expensive unless the equipment had a wide application throughout the LMS service.

FCR has been working ever since the auction (21) to start a viable LMS system. It was aware of the grandfathered operations in Miami and elsewhere using equipment supplied by Tadiran. It was also aware of the operations of Tadiran in Israel in providing multilateration location monitoring services. In fact, Tadiran's equipment was developed to meet Israeli standards, not US LMS standards. What FCR did not know was that Tadiran was the *only* provider of equipment for this service and that the equipment had significant limitations at that time, including problems operating in an urban environment, and that the system was operated with various degrees of inaccuracy that made it commercially non-viable. It apparently never operated with the anything close to

[1]The remaining 42 LMS licenses were due to be auctioned, in January 2002, in Auction 43. Due to a lack of interest in the 42 remaining LMS licenses, however, the LMS portion of that auction was postponed and, to date, has not been rescheduled.
[2]The major authorization holders are Progeny LMS, LLC; Telesaurus Holdings GB, LLC; and PCS Partners.

the reliability and accuracy of GPS. FCR met with a representative of Tadiran and thoroughly explored the functioning of the system and it was during that meeting that the limitations became apparent. FCR was advised that the manufacturer was attempting to refine the product. Since then, to the best of FCR's knowledge, the provider has ceased production and operation of the LMS-like system in Israel.

As previously noted, Progeny LMS, LLC ("Progeny") is a major holder of authorizations in the Location Monitoring Service. In March of 2002, Progeny filed a Petition for Rulemaking to make changes to the LMS Rules (*see* RM-10403). If Progeny's proposals are adopted, in whole or in part , the Rule changes will have a significant impact both on the equipment that is designed for LMS and the basic system layout. To date, there has been no action by the Commission on the petition, but the mere existence of RM-10403 and the changes proposed therein introduces an element of uncertainty that inhibits the development of LMS.

Progeny, in its above-referenced petition for rulemaking, describes the present state of equipment as follows:

> Progeny has diligently been seeking to implement service, but it has been unable to do so because of, *inter alia,* the absence of suitable equipment. As a result of the various limitations which currently apply to LMS licensees, manufacturers apparently have been unwilling to commit the resources necessary to design and develop equipment that will support the narrow offerings LMS licensees can provide under the current rules. Manufacturers do not perceive that there is a market, given current regulatory restraints, to justify such significant investments.
>
> In an effort to move forward to provide service using its LMS licenses, Progeny has held discussions with a virtual "Who's Who" of American manufacturers of telecommunications equipment. The response from several of the largest equipment suppliers, as well as from more entrepreneurial providers, has been consistent: the narrow "market" for a stand-alone location and monitoring service (particularly with the constraints imposed by the Commission) will not be sufficient to justify the time and expenses necessary to develop equipment for that market. The feedback has been uniform. For example, one equipment supplier said that both its regulatory team and its engineers had examined the possibility of manufacturing equipment and investing capital to develop the LMS spectrum. They concluded that, given the regulatory restrictions that govern the spectrum, the company could not justify any investment in LMS. Another service provider opined that, given the onerous regulations that apply, Progeny would not find any company that would take the risk of developing LMS equipment. Other prospects concluded that the band

> would not be viable without "real time interconnectivity" to the public switched network. Further opinion was offered that GPS had "rendered the LMS band antiquated."
>
> Moreover, this problem of equipment unavailability is exacerbated by the current status of the telecommunications equipment manufacturing sector. Equipment manufacturers in general have seen their stock prices plummet and their sources of capital dry up, thus making it even more unlikely that any manufacturer will risk investing its limited research and development resources in equipment for LMS. [*Footnote in original: By way of example, industry leaders Lucent and Nortel Networks shares have both traded above $80 per share (in mid-1999 and early-2000, respectively), but both companies' shares were priced as low as less than $6 per share in trading during mid-February 2002.*] The market is unproven at best, and as discussed herein, the severe service restrictions and emergence of deep-pocketed competitors (CMRS carriers who are now required to incorporate location capabilities in their systems) make it unlikely that LMS will develop under the current limitations. Thus, Progeny does not anticipate any solution to the current dilemma caused by the absence of equipment for LMS, absent changes to the Commission's Rules.

Also holding a large number of LMS authorizations are Warren C. Havens and Telesaurus Holdings GB, LLC. In December of 2003, they simultaneously notified the Commission that they were undertaking to design equipment for the LMS service and asked the Commission to extend until expiration their LMS build-out requirements so that their development efforts would not be wasted.[3] To date, the Commission has not acted. However, Havens addressed the equipment issues as follows in that waiver request:

> Prior to the auction of LMS-M EA-based licenses, including the Licenses, one company, Teletrac, acquired and operated first-generation LMS-M equipment provided by an equipment supplier, Tadiran. No other company has produced equipment for commercial LMS-M stations. [*Footnote in original: In the 1990's, other companies had to varying degrees worked on development of LMS-M equipment, as evidenced in the various LMS rulemaking documents. However, only Tadiran produced equipment actually used in commercial operation.*] This equipment provided basic location and associated short "status" messaging. Havens investigated this equipment soon after the auction of LMS-M licenses in early 1999;

[3] *See* Request for Partial Waiver file by Warren C. Havens for an extension of the buildout dates for WPOS5876 et al., page 3.

however, it was no longer commercially available.[*Footnote in original: Shortly after the first auction of LMS-M licenses in year 1999, the Teletrac President informed Havens that Teletrac cancelled its equipment supply contract with Tadiran. He also provided to Havens contact information to key persons at Tadiran. Tadiran did not respond to several inquires by Havens concerning their multilateration equipment. In addition, it is clear that if Tadiran was still seeking to provide this equipment to the market, it would have contacted Havens since he held the majority of the A block licenses in the nation, and the equipment it provided to Teletrac was specifically A-block LMS-M equipment. (Teletrac held only A-block LMS-M licenses.)*] In addition, it failed in the marketplace and, even if still available, it would not meet current and future marketplace application demands, [*Footnote in original: Havens spent considerable time discussing, under confidentiality agreement, with staff of Teletrac including its then President, the experience it had in the marketplace, its equipment, etc. Reasons for this failure (and why others using such equipment if it were again made commercially available would also fail) include, per Havens understanding, the following. To be successful in the marketplace, the equipment must provide both efficient and accurate location with a high level of spectrum efficiency (see preceding footnote), as well as voice and data communications permitted under section 90.353 (b) and (c), also with spectrum efficient technology. A location-only service will not be successful, from all the evidence in the marketplace. As the Commission knows, all the major CMRS operators plan to provide or are already rolling out a variety of location based services since they must have the core location capability in place for E911. The Teletrac multilateration service, apart from the location function, provided only short-status message service. It failed in the marketplace even before this rollout of CMRS location services*.] nor FCC goals and operator needs for spectrum efficiency. [*Footnote in original: Before Teletrac filed for bankruptcy and was sold, Havens visited Teletrac, executed a confidentiality agreement, and obtained and reviewed with an engineering consultant, details regarding the Teletrac- Tadiran equipment. It was not spectrum efficient (compared to current and emerging technologies) nor did it have any communication capabilities other than very low-rate data for status messaging.*]

For whatever the reason, the fact remains that, to the best of FCR's knowledge, no equipment is available to LMS authorization holders. Absent equipment availability, FCR, Inc. cannot construct an LMS system. The requested three-year extension of the build-out requirement should allow for resolution of the regulatory issues and development of the necessary equipment.

NEXT DOCUMENT

EXHIBIT 14 FOLLOWS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
PCS Partners, L.P., Petition for Waiver and Request for Refund	)
	)
	)
	)

ORDER

Adopted: March 1, 2007 **Released: March 1, 2007**

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we deny the request of PCS Partners, L.P. ("PCS Partners") for a waiver of Section 1.2109(a) of the Commission's rules,[1] which required PCS Partners to pay the outstanding balance of its winning bids for 32 Multilateration Location and Monitoring Service ("MLMS") licenses it won at auction (the "Licenses").[2] Section 1.2109(a) of the Commission's rules requires a winning bidder to pay the balance of its winning bids by the established deadline or within ten days after the deadline if it also pays a late fee.[3] A winning bidder that fails to pay the balance of its winning bid by the late payment deadline is considered to be in default and subject to the default payments set forth in Section 1.2104.[4]

2. PCS Partners won the Licenses in Auction No. 39. It made full payment of the balance of its winning bids by the payment deadline and submitted its Waiver Request on the

[1] 47 C.F.R. § 1.2109(a).

[2] Petition for Waiver and Request for Refund in re PCS Partners, LP of PCS Partners, L.P., filed on November 19, 2002 (the "Waiver Request"). The Licenses at issue are: BEA005 (Albany-Schenectady-Troy, NY), BEA006 (Syracuse, NY-PA), BEA007 (Rochester, NY-PA), BEA020 (Norfolk-Virginia Beach-Newport News, VA-NC), BEA022 (Fayetteville, NC), BEA025 (Wilmington, NC-SC), BEA026 (Charlestown-North Charleston, SC), BEA042 (Asheville, NC), BEA046 (Hickory-Morganton, NC-TN), BEA049 (Cincinnati-Hamilton, OH-KY-IN), BEA050 (Dayton-Springfield, OH), BEA051 (Columbus, OH), BEA059 (Green Bay, WI-MI), BEA060 (Appleton-Oshkosh-Neenah, WI), BEA067 (Indianapolis, IN-IL), BEA070 (Louisville, KY-IN), BEA074 (Huntsville, AL-TN), BEA087 (Beaumont-Port Arthur, TX), BEA096 (St. Louis, MO-IL), BEA097 (Springfield, IL-MO), BEA099 (Kansas City, MO-KS), BEA104 (Madison, WI-IA-IL), BEA105 (La Crosse, WI-MN), BEA106 (Rochester, MN-IA-WI), BEA107 (Minneapolis-St. Paul, MN-WI-IA), BEA108 (Wausau, WI), BEA109 (Duluth-Superior, MN-WI), BEA125 (Oklahoma City, OK), BEA132 (Corpus Christi, TX), BEA133 (McAllen-Edinburg-Mission, TX), BEA135 (Odessa-Midland, TX), and BEA157 (El Paso, TX-NM).

[3] 47 C.F.R. § 1.2109(a).

[4] *Id.*; *see also id.* at § 1.2104.

following day, November 19, 2002. PCS Partners argues that its obligations as the winning bidder for the Licenses should be voided, that it should not have been required to pay the balance of its winning bids, and that it should be refunded the total amount of its payments for the Licenses.[5] On July 25, 2003, subsequent to the filing of the Waiver Request, the Commission granted the Licenses. PCS Partners remains the current licensee. For the reasons set forth below, we find all of PCS Partners' arguments to be without merit.

II. BACKGROUND

3. On February 23, 2001, the Commission announced that beginning on June 6, 2001, it would auction 16 VHF public coast licenses and 241 MLMS licenses in Auction No. 39.[6] PCS Partners timely filed an FCC Form 175 ("short-form application") to participate in Auction No. 39, certifying its eligibility for bidding credits as a very small business. PCS Partners listed its annual gross revenues for calendar years 1997, 1998, and 1999 in its short-form application. The Commission announced on May 11, 2001, that the short-form application of PCS Partners had been accepted for filing.[7] On May 25, 2001, following the upfront payment deadline, the Commission identified PCS Partners as qualified to participate in Auction No. 39 as a very small business.[8] Telesaurus Holdings GB, LLC ("Telesaurus"), also a participant in Auction No. 39, then filed a June 4, 2001, petition seeking either reconsideration of PCS Partners' status as a qualified bidder or a stay of the auction.[9]

4. The Telesaurus Petition claimed that the short-form application of PCS Partners should be rejected on the grounds that it used the annual gross revenues for calendar years 1997, 1998, and 1999, rather than calendar years 1998, 1999, and 2000. In the alternative, the Telesaurus Petition requested that PCS Partners not receive the bidding credit available to very small businesses. It further asked that the Commission stay Auction No. 39 until relief could be granted.[10]

5. Bidding in Auction No. 39 began on June 6, 2001, and concluded on June 13, 2001.[11] PCS Partners submitted winning bids on 32 licenses, with total gross bids of $813,600

[5] Voiding in full the obligations of PCS Partners as the winning bidder for the Licenses would entail return of the Licenses to the Commission.

[6] "Auction of Licenses for the VHF Public Coast and Location and Monitoring Services Spectrum Scheduled for June 6, 2001," *Public Notice*, 16 FCC Rcd 4575 (2001).

[7] "Auction of Licenses for VHF Public Coast and Location and Monitoring Services Spectrum Auction: Status of FCC Form 175 Applications to Participate in the Auction, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues," *Public Notice*, 16 FCC Rcd 9529 (2001).

[8] "Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum Auction, 7 Qualified Bidders," *Public Notice*, 16 FCC Rcd 11566 (2001).

[9] Petition for Reconsideration and Request for Stay of Telesaurus Holdings GB, LLC, filed on June 4, 2001 (the "Telesaurus Petition"). In response PCS Partners filed the Opposition to Petition for Reconsideration and Request for Stay of PCS Partners, L.P. on June 12, 2001. Telesaurus then filed the Reply to Opposition of Telesaurus on June 19, 2001.

[10] Telesaurus Petition at 2-7, 19, and 20-22.

[11] "VHF Public Coast and Location and Monitoring Service Spectrum Auction Closes; Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 12509 (2001) ("*Auction No. 39 Closing Public Notice*").

and total net bids of $522,840. Telesaurus was the winning bidder on 79 licenses.[12] The FCC Form 601 ("long-form application") of PCS Partners was accepted on August 8, 2001, on which date the period for filing petitions to deny, provided for under Section 1.2108 of the Commission's rules, began.[13] Telesaurus subsequently filed a petition to deny the long-form application of PCS Partners.[14] The Telesaurus Petition to Deny asserted that PCS Partners was a speculative investor and had applied for MLMS licenses only for mobile radio services and not for the radiolocation service that is required of MLMS. The Telesaurus Petition to Deny claimed that PCS Partners had violated the Commission's gross revenue disclosure rules by not including revenue information for the year 2000, as well as for its controlling interest holder and several affiliates. It requested that the Wireless Telecommunications Bureau (the "Bureau") either deny the long-form application of PCS Partners or refuse to allocate any bidding credits to PCS Partners and audit its reported gross revenues.[15]

6. On October 11, 2002, the Bureau denied the Telesaurus Petition. The Bureau found that PCS Partners had met the threshold requirements to participate in Auction No. 39.[16] It deferred consideration of whether PCS Partners had properly disclosed its annual gross revenues until review of the Petition to Deny filed against PCS Partners' long-form application.[17] On October 29, 2002, the Bureau rejected the Telesaurus Petition to Deny, finding that an audit of the reported gross revenues of PCS Partners would be unnecessary. The Bureau also determined that there were no grounds on which to deny either the long-form application of PCS Partners or its bidding credit request.[18]

7. The Bureau announced on November 1, 2002, that it was prepared to grant PCS Partners' application for the Licenses upon full and timely receipt of the balance of the winning bids.[19] The Bureau required that payment be received by November 18, 2002, and allowed a late payment to be made by December 3, 2002, provided that it was accompanied by a late fee of five percent.[20] On November 12, 2002, Telesaurus filed an Application for Review of the October 11,

---

[12] *Id.* at Attachment A.

[13] "VHF Public Coast and Location and Monitoring Service Spectrum Auction: Applications Accepted for Filing; Auction Event No. 39; Pleading Cycle Established," *Public Notice*, 16 FCC Rcd 15135 (2001).

[14] Petition to Deny the Form 601 Application of PCS Partners, L.P. for New Licenses for LMS Spectrum, filed by Telesaurus Holdings GB, LLC, dated August 20, 2001 ("Telesaurus Petition to Deny"). In response PCS Partners filed the Opposition to Petition to Deny the FCC Form 601 Applications of PCS Partners, L.P. for New Licenses for LMS Spectrum, dated August 27, 2001.

[15] Telesaurus Petition to Deny at 1-2.

[16] Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, *Order*, 17 FCC Rcd 19746 (2002) ("*October 11, 2002 Order*").

[17] *Id.* The Bureau further found that there was no basis for Telesaurus's request to stay the auction.

[18] PCS Partners, L.P., *Order*, 17 FCC Rcd 21419 (2002) ("*October 29, 2002 Order*").

[19] "Wireless Telecommunications Bureau Announces It Is Prepared to Grant Location and Monitoring Service Licenses Upon Full and Timely Payment," *Public Notice*, 17 FCC Rcd 21683 (2002).

[20] *Id.*

2002 Order.[21] PCS Partners paid its outstanding balance for the Licenses on November 18, 2002, and filed its Waiver Request on November 19, 2002.[22] The Waiver Request asks that the Bureau waive Section 1.2109(a) of the Commission's rules by granting PCS Partners "a refund of the entirety of its deposit and balance of winning bids in Auction No. 39 and relief from all of its obligations associated with its winning bids in Auction No. 39."[23]

8. Subsequent to the filing of the Waiver Request, the Commission granted the Licenses to PCS Partners on July 25, 2003. Telesaurus filed a Request for Approval to Withdraw with prejudice the Application for Review and Petition for Reconsideration on December 30, 2003. On January 13, 2004, the Bureau approved this Request for Approval to Withdraw and dismissed with prejudice the Application for Review and Petition for Reconsideration.[24] The Licenses are currently on active status, and PCS Partners remains the licensee.

III. DISCUSSION

9. PCS Partners seeks relief from its obligation to pay for the Licenses it won in Auction No. 39, without having to make the default payment required by Section 1.2109(a) of the Commission's rules. To obtain a waiver of the Commission's rules, an applicant must show either that (i) the underlying purpose of the applicable rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) the unique factual circumstances of the particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.[25]

10. In support of its request for a waiver, PCS Partners makes four main arguments. First, it claims that a decline in the value of the Licenses during the pendency of the pleadings filed by Telesaurus justifies a waiver.[26] It cites, second, the relief granted by the Commission to

[21] Application for Review of Telesaurus Holdings GB, LLC, dated November 12, 2002 (the "Application for Review"). In response PCS Partners filed an Opposition to the Application for Review dated November 27, 2002. Telesaurus then filed a Reply to the Opposition to the Application for Review on December 11, 2002. On November 29, 2002, Telesaurus had filed a Petition for Reconsideration of the October 29, 2002 Order (the "Petition for Reconsideration"). PCS Partners filed an Opposition to the Petition for Reconsideration on December 12, 2002, and Telesaurus filed a Reply to the Opposition to the Petition for Reconsideration on December 24, 2002. Telesaurus filed a Request for Leave to Supplement and a Supplement to the Reply to the Opposition to the Petition for Reconsideration on January 8, 2003. PCS Partners filed an Opposition to the Request for Leave and Supplement on January 21, 2003.

[22] The Commission's rules allow it to demand final payment for the Licenses notwithstanding that Telesaurus's Application for Review and Petition for Reconsideration were pending. *See, e.g.*, Delta Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 16889 ("*Delta Radio*").

[23] Waiver Request at 1.

[24] In addition to the Application for Review and the Petition for Reconsideration, the Bureau dismissed all related filings (the filings of Telesaurus are collectively identified as the "Telesaurus Pleadings"). "Wireless Telecommunications Bureau Mobility Division Approves Withdrawal of Application for Review and Petition for Reconsideration," *Public Notice*, 19 FCC Rcd 390 (2004).

[25] 47 C.F.R. § 1.925.

[26] Waiver Request at 3.

certain winning bidders in Auction No. 35 as applicable precedent for the Waiver Request.[27] The third argument of PCS Partners is that the delay in the award of the Licenses has voided its payment obligations for them.[28] Finally, PCS Partners asserts that the Telesaurus Pleadings are strike pleadings that abused the Commission's processes, therefore warranting the grant of the Waiver Request.[29] For the reasons discussed below, we find that PCS Partners has not made a sufficient showing to meet the standard for a waiver.

11. Considering the first prong of the waiver standard, we find that PCS Partners has failed to establish that the underlying purpose of the Commission's rules would not be served by enforcement of PCS Partners' payment obligations in this instance. The Commission's competitive bidding rules are designed to maintain a fair and efficient license assignment process that promotes a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum. [30] The payment requirements and default provisions of Section 1.2109 function, *inter alia*, to deter insincere bidding by entities that are not prepared to use the spectrum efficiently and effectively. As the Commission has also explained, the default payment rules deter winning bidders from waiting until after the close of an auction to decide whether to accept the assignment of the licenses they have won.[31] If auction participants were allowed to decide after the close of an auction that they did not wish to pay their winning bids and accept the assignment of the licenses they had won, the Commission's ability to assign licenses efficiently by auction would be severely undermined. Moreover, if the Commission were to allow such post-auction decisions without imposing any consequences, its auctions would no longer be fair to all participants, including those who win licenses and those who do not. PCS Partners has not demonstrated that the underlying purpose of Section 1.2109(a) would be frustrated by its application in this instance. Indeed, we find that the grant of a waiver of the rule in this instance would undermine the Commission's ability to conduct fair and efficient auctions for the benefit of the public, contrary to the Commission's statutory obligation.

12. PCS Partners argues that it should be relieved of its payment obligations for the Licenses because of the delay between the conclusion of Auction No. 39 and the grant of the Licenses.[32] As noted previously, the Licenses were granted to PCS Partners in July of 2003. PCS Partners maintains that it had an expectation that the Licenses would be granted more quickly, but

[27] *Id.* at 4. As discussed more fully below, on November 14, 2002, based on the specific circumstances related to Auction No. 35, the Commission allowed certain winning bidders in that auction to request dismissal of their long-form applications and refund of their associated down payments.

[28] Waiver Request at 8.

[29] *Id.* at 10.

[30] 47 U.S.C. §§ 309 (j)(3)(A) & (D). *See also* H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.").

[31] *See* Winstar Broadcasting Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 6126, 6132 ¶ 15 (2002) ("*Winstar*").

[32] Waiver Request at 9.

that the Commission's consideration of the Telesaurus Pleadings prevented this from occurring.[33] PCS Partners claims that the resolution of the Telesaurus Pleadings required only the "simple application of established Commission rule and precedent and no factual discovery."[34] It contends that a licensing delay of more than fifteen months, due to the consideration of pleadings like those of Telesaurus, should void its obligations as a winning bidder to purchase the Licenses. However, PCS Partners offers no precedent that supports this position.[35] The relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions. Participants in Auction No. 39 were informed of the obligation to fully familiarize themselves with the Commission's rules,[36] including the licensing process rules, which provide the opportunity for interested persons to file petitions to deny.[37] Thus, in deciding to participate in Auction No. 39, PCS Partners knew or should have known about the possibility of delay resulting from the filing of petitions to deny. As noted above, one of the principal purposes of our payment rules is to deter winning bidders, such as PCS Partners, from waiting until the time of the license grant to decide whether to accept a license.[38] Voiding the obligations of PCS Partners to pay its winning bids for the Licenses would encourage bidders to engage in precisely such a strategy in future auctions.

13. With respect to the second prong of the waiver standard, we are not persuaded that PCS Partners has presented any unique facts or circumstances that merit waiving its obligation to pay for the licenses on which it was the winning bidder in Auction No. 39. PCS Partners' cited business problems do not amount to unique circumstances. PCS Partners contends that the Licenses declined in value during the pendency of the Telesaurus Pleadings, in part because of a generalized "gradual worsening of conditions in the telecommunications sector."[39] It further asserts that competitive substitutes for MLMS services were deployed during the

[33] Telesaurus filed its Petition to Deny on August 20, 2001. We note that both Telesaurus and PCS Partners continued to submit filings on the issues raised in the Petition to Deny until January 21, 2003, when PCS Partners filed its Opposition to Telesaurus's Request for Leave and Supplement. *See supra* notes 14 and 21.

[34] Waiver Request at 10. As subsequently discussed, PCS Partners maintains that the Telesaurus Pleadings are "strike pleadings" that abused the Commission's processes. However, it fails to provide sufficient evidence to meet the stringent threshold applied to strike pleading allegations. *See infra* ¶¶ 19-21.

[35] PCS Partners cites one Commission decision. This decision in fact undermines the arguments of PCS Partners in its conclusion that a winning bidder has "the binding obligation to pay for its licenses." Waiver Request at 9; *see also* BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17,590, 17,600 ¶ 16 (2000), *petition for review denied, BDPCS, Inc. v. FCC,* 351 F.3d 1177 (D.C. Cir. 2003). PCS Partners also cites certain legal memoranda filed in litigation concerning the NextWave/Urban Comm Spectrum. Such sources have no precedential value. Waiver Request at 9.

[36] "VHF Public Coast and Location and Monitoring Service Spectrum Auction Scheduled for June 6, 2001; Notice and Filing Requirements for 16 Licenses in the VHF Public Coast and 241 Licenses in the Location and Monitoring Service Auction; Minimum Opening Bids, Upfront Payments and Other Procedural Issues," *Public Notice*, 16 FCC Rcd 6986, 6991-92 (2001) ("*Auction No. 39 Procedures Public Notice*").

[37] 47 C.F.R. § 1.939; *see also id.* § 1.2108

[38] *Winstar*, 17 FCC Rcd at 6132 ¶ 15.

[39] Waiver Request at 3.

pendency of the Telesaurus Pleadings. PCS Partners also claims that it was prevented during this period of time from investing in the development of the Licenses due to the uncertainties associated with the outcome of the Telesaurus Pleadings.[40] It states that the combination of these factors has "substantially impaired" the value of the Licenses.

14. Each Commission licensee faces such risks as the decline in the market value of its business assets. All business entities, not merely those involved in the telecommunications industry, must accept the potential for unwanted legal disputes and downturns in the marketplace. The Commission has repeatedly determined that ordinary business risks, such as difficulties in obtaining financing or unfavorable market conditions, do not constitute unique factual circumstances that would justify a waiver.[41] The Commission also warned prospective Auction No. 39 participants that an "FCC auction does not constitute an endorsement by the FCC of any particular services . . . nor does an FCC license constitute a guarantee of business success."[42] PCS Partners cites a general decline in the telecommunications sector and the deployment of substitutes for MLMS services as factors in the asserted loss in value of the Licenses. However, PCS Partners has not shown that it would have faced a different business environment absent the Commission's consideration of Telesaurus's Petition to Deny and subsequent pleadings.

15. We also decline to grant a waiver of the auction payment rules based on PCS Partners' assertion that it is similarly situated to certain winning bidders in Auction No. 35.[43] In Auction No. 35, the Commission made available, *inter alia,* many Broadband PCS licenses for spectrum in the C and F blocks that had been previously licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm"). NextWave's and Urban Comm's licenses had cancelled for non-payment after the parties had filed for bankruptcy in 1998 and were the subject of ongoing litigation when they were made available in Auction No. 35. Of the 35 winning bidders in Auction No. 35, 22 won licenses for spectrum that was associated with NextWave's and Urban Comm's licenses, with net bids accounting for $16.3 billion of the $16.9 billion in total net winning bids for all licenses in the auction. After the close of Auction No. 35, the United States Court of Appeals for the District of Columbia Circuit, in *NextWave v. FCC*, ruled that the Bankruptcy Code prevented the cancellation of the NextWave/Urban Comm licenses.[44]

---

[40] *Id.* at 4.

[41] Letter to John Jung from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 14,427, 14,431-32 (2003); *see also* Letter to Mr. Kurt Schueler, President, New England Mobile Communications, Inc., from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 16 FCC Rcd 19,355, 19,359 (2001); Letter to Messers. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6448 (2002).

[42] *Auction No. 39 Procedures Public Notice*, 16 FCC Rcd at 6993.

[43] Waiver Request at 4.

[44] *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, 535 U.S. 904 (2002) ("*NextWave v. FCC*"). *But see NextWave Personal Communications Inc. and NextWave Power Partners Inc. v. FCC*, Nos. 00-1402 and 00-1403 (D.C. Cir. Nov. 13, 2000) (denial of NextWave's motion for stay of Auction No. 35). *See also FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003), *aff'g* 254 F.3d 130 (D.C. Cir. 2001) (The U.S. Supreme Court affirmed the D.C. Circuit's decision that because NextWave was under protection of Chapter 11 of the United States Bankruptcy Code its licenses did not automatically cancel for nonpayment while it was in bankruptcy.).

At the request of a number of Auction No. 35 winning bidders, and after seeking comment and compiling an extensive record, the Commission allowed Auction No. 35 bidders that had won licenses for NextWave and/or Urban Comm spectrum to request dismissal of their pending license applications and obtain a refund of associated Auction No. 35 payments.[45]

16. We are not persuaded by PCS Partners' claim that it is similarly situated to the Auction No. 35 winning bidders of licenses for spectrum that had been previously licensed to NextWave and/or Urban Comm. PCS Partners cites purported harm to consumers and worsening capital availability problems as justifying the same type of relief granted in the *Auction No. 35 Order*.[46] It also compares the delays associated with the Telesaurus Pleadings to the problems posed by the complex litigation involving NextWave.[47] However, in making these claims, PCS Partners misreads the grounds for the Commission's offer of relief in the *Auction No. 35 Order*. There the Commission based its decision on "the concurrence of a unique situation where capital and spectrum were tied up for more than two years by litigation, and the worsening economic conditions in the wireless industry have had a substantial adverse effect on consumers."[48] The Commission noted that the circumstances arising out of Auction No. 35 affected a "broad segment of the nation's wireless companies"[49] as well as other related companies, and that the impact on the telecommunications sector affected "the economy as a whole."[50]

17. In contrast, PCS Partners provides only unsubstantiated assertions of consumer harm based on "expected" LMS services that it might provide.[51] In addition, PCS Partners asserts hypothetical injury based on its lack of capital for what it admits is a "service in its infancy."[52] Moreover, the petition to deny process to which PCS Partners was subjected directly pertained to its status as an applicant and did not make the licenses unavailable the way that Auction No. 35 licenses were unavailable to the winning bidders based on a court ruling that was entirely beyond their control. Finally, although PCS Partners acknowledges the difference in scale between its circumstances and the circumstances of the 22 Auction No. 35 winning bidders, which accounted for $16.3 billion in net bids, it fails to recognize, as noted above, that the large scale of the Auction No. 35 circumstances was critical to the Commission's decision to offer relief in the *Auction No. 35 Order*. Accordingly, the *Auction No. 35 Order* does not provide grounds to grant relief to PCS Partners.

18. We also reject the argument that we should relieve PCS Partners of its

---

[45] Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made In Auction No. 35, *Order and Order on Reconsideration*, 17 FCC Rcd 23354 (2002) ("*Auction No. 35 Order*").

[46] Waiver Request at 5-6.

[47] *Id.* at 7.

[48] *Auction No. 35 Order*, 17 FCC Rcd at 23360-61 ¶ 10.

[49] *Id*.

[50] *Id*.

[51] Waiver Request at 5.

[52] *Id.* at 6.

obligations as a winning bidder based on its assertion that the Telesaurus Pleadings are "strike pleadings" that abused the Commission's processes. We find that the Telesaurus Pleadings do not meet the standard for strike pleadings. In addition, we conclude that even if we were to find that the Telesaurus Pleadings are strike pleadings, the appropriate remedy would be to impose sanctions on Telesaurus and not to waive PCS Partners' obligations to pay the full amount of its winning bids.

19. The Commission defines a strike pleading as one "filed in bad faith for the primary purpose of blocking, impeding, or delaying the grant of an application."[53] To support its claim that Telesaurus had an obstructive purpose and that the Telesaurus Pleadings lacked a reasonable basis, PCS Partners cites a statement by Telesaurus describing its business plans, and an alleged statement by Telesaurus that it had been counseled that its effort to exclude PCS Partners from Auction No. 39 would be unsuccessful.[54] Despite its assertions, the evidence offered by PCS Partners does not in fact include any actual admission of an obstructive purpose to the Telesaurus Pleadings.[55] The economic motivation to delay a proceeding alone is not enough to establish a prima facie case that pleadings were filed with the sole purpose of doing so.[56] Even where an entity "may have gained some benefit from normal processing delays," the Commission has refused to infer a strike motive from the filing of an informal objection.[57]

20. We also disagree with PCS Partners' argument that our previous decisions that the Telesaurus Petition and the Telesaurus Petition to Deny lacked "substantiated evidence of wrongdoing" and included an "incorrect" interpretation of our rules indicate that these were strike pleadings.[58] The Commission has found that a petition can fail "to raise a substantial and material question of fact," but nonetheless not be "so frivolous as to constitute a 'strike' pleading."[59] The

[53] In re Application of High Plains Wireless, L.P., *Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 4620, 4623 ¶ 7 (2000) ("*High Plains Wireless*"); *see also* Application of Hispanic Information and Telecommunications Network, Inc., *Order on Reconsideration*, 19 FCC Rcd 2829, 2833-34 ¶ 11 (2004). The principal factors considered as significant indications that a petition to deny was filed primarily or substantially for the purpose of delay are: (1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to the disposition of the requested issues; (3) the absence of any reasonable basis for the adverse allegations in the petition; (4) economic motivation indicating a delaying purpose; and (5) other conduct of the petitioner. William P. Johnson and Hollis P. Johnson, d/b/a Radio Carrollton, *Decision*, 69 FCC 2d 1138, 1145 ¶ 24 (1978), *clarified*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff'd mem. sub nom. Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert. denied*, 450 U.S. 1041 (1981).

[54] Waiver Request at 11.

[55] *Id*.

[56] In re Applications of Utica Telephone Company, *Memorandum Opinion and Order*, 5 FCC Rcd 2791, 2793 ¶ 20 (1990) ("*Utica Telephone Company*") (finding that a petition contained "frivolous" arguments, but had not been demonstrated to be a strike pleading).

[57] In re Applications of Lint Co. (Assignor) *et alia*, *Memorandum Opinion and Order*, 15 FCC Rcd 18130, 18136-37 ¶ 12 (2000).

[58] Waiver Request at 12; *see also October 11, 2002 Order*, 17 FCC Rcd at 19752; *October 29, 2002 Order*, 17 FCC Rcd at 21421.

[59] In Re Application of American Mobilephone, Inc. and Ram Technologies, Inc., *Order*, 10 FCC Rcd 12,297, 12,299 ¶ 12 (1995). *See also Utica Telephone Company*, 5 FCC Rcd at 2793 ¶ 20.

claim that "there was an absence of any reasonable basis" for the allegations of a filing is insufficient to raise the issue of a strike petition.[60] We therefore find no basis to conclude that the Telesaurus Pleadings are strike pleadings.[61]

21. Moreover, even if we were to decide that the Telesaurus Pleadings are strike pleadings, we think the appropriate remedy for such an abuse of process would be to impose sanctions on Telesaurus, rather than grant PCS Partners' waiver request. PCS Partners cites no authority to support its assertion that such pleadings warrant granting it relief from its obligation to pay its winning bids. Such a remedy would not serve as a deterrent to future abuses of process and, as explained above, would undermine the Commission's ability to conduct fair and efficient auctions. Thus, the Telesaurus Pleadings provide us with no basis upon which to grant PCS Partners' Waiver Request. Nonetheless, we caution all parties with business before the Commission to avoid filing petitions and other pleadings which contain arguments having little or no factual or legal basis.[62]

IV. CONCLUSION

22. PCS Partners has presented no reasons justifying a waiver of its payment obligations as the winning bidder for the Licenses. We reject its request for a waiver of the Commission's payment rules and the refund of its payments for the Licenses. In denying this request, we find that the application of the rules in this case will not frustrate their underlying purpose, is not contrary to the public interest, and is not inequitable, unduly burdensome, or otherwise contrary to the public interest.

V. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED that, pursuant to authority granted in Section 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), the Petition for Waiver and Request for Refund of PCS Partners, L.P., is DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.
Chief, Wireless Telecommunications Bureau

---

[60] Letter to Mr. Steven Wendell in re: Long Island Multimedia, LLC from Peter H. Doyle, Chief, Audio Division, Media Bureau, 21 FCC Rcd 8665, 8667-68 ¶ 5 (2006).

[61] PCS Partners briefly suggests that the Telesaurus Pleadings should justify its requested relief, even if they do not constitute strike pleadings. As grounds for this argument, which is contained in a single sentence, PCS Partners claims that the Telesaurus Pleadings caused an unreasonable delay, relied on misapplied law and precedent, and did not require factual inquiry beyond the Commission's public files. However, it provides no legal authority for its position. Accordingly, we decline to provide such unprecedented relief. Waiver Request at 13.

[62] *See, e.g.,* Applications of Mobex Network Services, *Order on Reconsideration*, DA 07-148, 2007 WL 162500 ¶ 16 (rel. January 23, 2007).

NEXT DOCUMENT

EXHIBIT 15 FOLLOWS

REQUEST FOR EXTENSION OF TIME

PCS Partners, L.P. ("PCSP"), pursuant to Sections 1.946(e) and 90.155(g) of the Commission's Rules, hereby requests an extension of time to meet the five-year and ten-year construction deadlines for the following 900 MHz Multilateration Location and Monitoring Service ("M-LMS") licenses held by PCSP:

Call Sign	5-Year Buildout Deadline	Expiration Date
WPYE267	07/25/2008	07/25/2013
WPYE268	07/25/2008	07/25/2013
WPYE269	07/25/2008	07/25/2013
WPYE270	07/25/2008	07/25/2013
WPYE271	07/25/2008	07/25/2013
WPYE272	07/25/2008	07/25/2013
WPYE273	07/25/2008	07/25/2013
WPYE274	07/25/2008	07/25/2013
WPYE275	07/25/2008	07/25/2013
WPYE276	07/25/2008	07/25/2013
WPYE277	07/25/2008	07/25/2013
WPYE278	07/25/2008	07/25/2013
WPYE279	07/25/2008	07/25/2013
WPYE280	07/25/2008	07/25/2013
WPYE281	07/25/2008	07/25/2013
WPYE282	07/25/2008	07/25/2013
WPYE283	07/25/2008	07/25/2013
WPYE284	07/25/2008	07/25/2013
WPYE285	07/25/2008	07/25/2013
WPYE286	07/25/2008	07/25/2013
WPYE287	07/25/2008	07/25/2013
WPYE288	07/25/2008	07/25/2013
WPYE289	07/25/2008	07/25/2013
WPYE290	07/25/2008	07/25/2013
WPYE291	07/25/2008	07/25/2013
WPYE292	07/25/2008	07/25/2013
WPYE293	07/25/2008	07/25/2013
WPYE294	07/25/2008	07/25/2013
WPYE295	07/25/2008	07/25/2013
WPYE296	07/25/2008	07/25/2013
WPYE297	07/25/2008	07/25/2013
WPYE298	07/25/2008	07/25/2013

PCSP was the high bidder on the 32 above-listed Block A Economic Area M-LMS licenses in Auction 39, and was granted the licenses on July 25, 2003.

For each of the above-listed licenses, PCSP requests an additional four years, up to and including July 25, 2012, to meet the initial, five-year construction obligation set forth in Section 90.155(d) of the Commission's rules, and an additional four years, up to and including July 25, 2017, to meet the ten-year construction obligation set forth in Section 90.155(d).

PCSP notes that it is the only M-LMS licensee that to date has not requested or received an extension of time to meet its construction obligations; each of the other M-LMS licensees – Progeny LMS, LLC ("Progeny"); Warren C. Havens ("Havens"); Telesaurus Holdings GB, LLC ("Telesaurus"); FCR, Inc. ("FCR"); and Helen Wong-Armijo ("Wong-Armijo") – has been granted at least one extension.

PCSP is unable to meet the construction July 25, 2008, construction deadline due to causes beyond its control.[1] Less than 18 months ago, the Commission recognized that no M-LMS equipment is available for deployment in the United States. In the Matter of Multilateration Location and Monitoring Service Construction Requirements, *Order on Reconsideration, and Memorandum Opinion and Order*, 22 FCC Rcd 1925 ¶6 (WTB MD 2007) ("*M-LMS Extension Order*"). At that time, the Commission granted requests for extensions of five-year and ten-year construction deadlines to FCR, Wong-Armijo, and Telesaurus, based on findings that the inability to meet their respective five-year

[1] PCSP certifies that its inability to meet the deadline is not the result of any failure by PCSP to obtain financing, to obtain an antenna site, or to order equipment in a timely manner. *See* 47 C.F.R. §§ 1.946(e)(2), 90.155(g).

construction obligations thus was due to causes beyond their control; that the public interest would be served by granting additional time to construct; and that strict application of the construction requirement would be contrary to the public interest. *Id.* at ¶¶ 8-11.

The Commission also found that conditions in the equipment market made construction impossible when it granted construction extensions prior to the *M-LMS Extension Order*. *See, e.g.*, Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses, *Memorandum Opinion and Order*, 21 FCC Rcd 5928, ¶13 (WTB MD 2006) ("*Progeny Extension Order*"). Similar findings have justified previous grants of M-LMS licensees' extension requests. *See* FCR, Inc., Request for Extension of Five-Year Construction Requirement, *Letter*, 20 FCC Rcd 4293 (WTB MD 2005); Warren C. Havens, Request for Waiver of the Five-Year Construction Requirement, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (WTB MD 2004).

More recently, the Commission granted a four-year extension of buildout deadlines to numerous Local Multipoint Distribution Service ("LMDS") licensees, after determining that "factors beyond their control, including difficulties in obtaining viable, affordable equipment," justified the extensions. Applications Filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 1.1.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, DA 08-867, ¶24 (WTB, rel. Apr. 11, 2008) ("*LMDS Extension Order*"). The *LMDS Extension Order* noted that "the

applications before us in this proceeding represent a majority of LMDS licenses for which buildout requirements are approaching, and that the types of challenges faced by these applicants in developing service for the band have been nearly uniform." *Id*. These statements apply with equal force to M-LMS licensees. However, the market for M-LMS equipment appears to be lagging the LMDS equipment market, where "equipment is becoming available." *Id*. at ¶24.

Based on its due diligence, PCSP believes there has been no material change in the equipment market since the Commission's January 2007 determination in the *M-LMS Extension Order* that a lack of M-LMS equipment made it impossible for licensees to meet their five-year construction deadline. Discussions by PCSP with various equipment companies have confirmed the present lack of equipment. (On Attachment A-1, PCSP discloses those equipment manufacturers whom PCSP has contacted regarding the commercial availability of M-LMS equipment.[2]) Based on those communications, PCSP believes no M-LMS equipment presently exists that would allow PCSP to commercially deploy an M-LMS network in those markets in which PCSP holds Commission authorizations. Moreover, as of the date of this request, FCC equipment authorization records reflect the approval of no additional M-LMS devices. As was noted in the *M-LMS Extension Order* (¶5), only five such devices have been approved since 1996.

[2] Pursuant to Sections 0.459 and 0.457 of the Commission's rules, PCSP requests confidential treatment of the information contained in Attachment 1-A, which reflects discussions between PCSP and third parties related to potential commercial transactions involving a competitive service, has not previously been publicly disclosed, is not information that PCSP would routinely make publicly available, and the disclosure of which would cause competitive harm to PCSP.

The status of the equipment market also is reflected in the Commission's ongoing rulemaking proceeding reexamining the use of the 902-928 MHz band by M-LMS licensees and other users. Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket No. 06-49, *Notice of Proposed Rulemaking*, 21 FCC Rcd 2809 (2006) ("*NPRM*"). As the Commission discussed at length in the *NPRM*, over the past decade, while there has been substantial development of equipment and applications for unlicensed Part 15 users, there has been relatively little for M-LMS. *See id*. at ¶¶ 1-16. PCSP has participated in the proceeding,[3] the outcome of which PCSP anticipates will bring greater certainty to the future of licensed operations in the 902-928 MHz band and hence accelerate the development and availability of viable equipment that can be used to provide M-LMS services compatible with other spectrum users.

In the interim, however, and as the Commission repeatedly has acknowledged, "spectrum sharing in the M-LMS band – among government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations – has hindered the ability of licensees to secure equipment." *See Progeny Extension Order* at ¶13. Because the Commission's rules (47 C.F.R. § 90.353(d)) require M-LMS licensees to demonstrate in field tests that equipment does not cause unacceptable interference to Part 15 unlicensed devices operating in the band, and because such devices utilize a wide and changing array of power levels and

[3] Reply Comments of PCS Partners, L.P., WT Docket No. 06-49, June 30, 2006.

other technical parameters, developing and manufacturing equipment compliant with the sharing regime has been difficult.

Although Docket No. 06-49 does reflect ongoing efforts to address sharing and other issues and develop viable equipment, there is nothing in the record to suggest that equipment will be available by PCSP's July 25 construction deadline. One M-LMS licensee recently suggested the use of TETRA technology as a solution to the lack of M-LMS equipment. Letter from Warren Havens, President, ATLIS Wireless LLC, to Marlene H. Dortch, Secretary, FCC, WT Dock et No. 06-49 (March 7, 2008). Although equipment based on TETRA technology may, as ATLIS Wireless suggests, be "feasible" (*id*. at 2), nonetheless, ATLIS also concedes that "TETRA … to date is still not sold in the US due to Motorola's assertions that it will sue, for patent infringement, entities … that buy and use TETRA in the US." *Id*. at 2 & n.4. The same licensee also has suggested "pseudo-satellites," or "pseudolites," for M-LMS use; however, no such equipment currently is available for M-LMS, and in any event there are technical impediments to its use in the M-LMS band.

PCSP also notes that its July 25, 2008, initial construction deadline is well in advance of the July 25, 2013 first renewal deadline for the licenses that are the subject of this request, which the Commission has found to be a significant factor in considering M-LMS extension requests. *See, e.g.*, *Progeny Extension Order*, ¶13.

In sum, to the best of PCSP's knowledge, no viable equipment is available that would permit PCSP to satisfy its initial construction deadline. Because PCSP's inability to meet the initial construction deadline for its M-LMS licenses is due to reasons beyond

its control, and a grant of an extension of that deadline will serve the public interest, PCSP respectfully requests a grant of this application.

Respectfully submitted,

/s/ David G. Behenna
David G. Behenna
President, PCSGP, Inc.
General Partner, PCS Partners, L.P.